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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction; HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Board of Education; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et al.,

Appellants,

v.

JAMES E. SWANN, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13 and 15, file this statement as to jurisdiction, setting forth the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal from an opinion and judgment of a 3-judge federal court to review the final judgment in question, and, further, that this Court should exercise such jurisdiction in this case.

OPINION BELOW

The 3-Judge Federal District Court for the Western District of North Carolina filed its written opinion on April 29, 1970; this opinion is not yet reported. A copy of the opinion is attached to the Jurisdictional Statement and appears on p. 16 of the Appendix attached hereto.

JURISDICTION

The appeal herein is from a judgment decided by a 3-judge federal court organized in the Western District of North Carolina and filed in the Office of the Clerk of the Court for the Western District of North Carolina on June 22, 1970, the same being a final judgment. In this judgment the 3-Judge Federal Court held unconstitutional and invalid a portion of a statute of North Carolina (Section 115-176.1 of the General Statutes of North Carolina—1969 Cumulative Supplement to Volume 3A) which said portion reads as follows:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and pubilc funds shall not be used for any such busing."

The 3-Judge Federal District Court further held that except for the portion above quoted the State statute was constitutional and valid.

The complete statute appears on p. 19 of the Appendix attached hereto.

The final judgment signed by the 3-Judge Federal Court declaring this portion of the State statute unconstitutional and restraining any action to enforce same on the part of the appellants is set forth on p. 15 of the Appendix attached hereto.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion and judgment of the 3-Judge District Court of the United States herein complained of by virtue of the provisions of 28 USC 1253. This is also a question that arises under the provisions of the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review this opinion and judgment on direct appeal in this case: FLORIDA LIME &

AVOCADO GROWERS, INC. v. JACOBSEN, 362 U. S. 73, 8 S. Ct. 568, 4 L. ed. 2d 568; ZEMEL v. RUSK, 381 U. C. 1, 85 S. Ct. 1271, 14 L. ed. 2d 179; PALMETTO FIRE INS. CO. v. CONN, 272 U. S. 205, 47 S. Ct. 88, 71 L. ed. 243; DEPARTMENT OF EMPLOYMENT v. UNITED STATES, 385 U. S. 355, 87 S. Ct. 464, 17 L. ed. 2d 414.

It is to be noted that the 3-Judge Federal Court granted an injunction against all of the State officers restraining them from carrying out the provisions of the statute above cited. This would seem to bring the case directly in line with the decisions where this Court will take jurisdiction and hear such an appeal.

It should be emphasized that the appellants do not question the organization of the 3-Judge Federal Court. The appellants concede that the constitutionality of the State statute was a proper case which requires a 3-judge court to pass upon the constitutional and injunctive issue. It is further conceded that the 3-Judge Federal Court was properly organized under a proper order, and, therefore, the jurisdiction of the 3-Judge Court to hear the case is not questioned.

The portion of Sec. 115-176.1 (1969 Supplement to Volume 3A) of the statutes of North Carolina declared to be unconstitutional consists of two sentences in said statute which we again quote, as follows:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and public funds shall not be used for such busing."

The 3-Judge Federal Court construed these two sentences to mean that they prohibited assignment by race and would prevent school boards from altering existing dual systems. Apparently the Court construed the word "balance" as prohibiting a school board from establishing the so-called Unitary System, and the Court said this violated the equal protection clause of the Fourteenth Amendment. Aside from the constitutional implications involved in the statute, we think the

Court has incorrectly construed the language of the statute since the 3-Judge Court evidently thought that the language substantially prohibited all busing.

QUESTIONS PRESENTED

THE 3-JUDGE FEDERAL DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA ERRED, AS FOLLOWS:

I. IN HOLDING AND CONCLUDING THAT THE NORTH CAROLINA STATUTE ABOVE QUOTED VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

II. IN ERRONEOUSLY CONSTRUING THE WORD "BALANCE" AS USED IN THE NORTH CAROLINA STATUTE TO BE A PROHIBITION AGAINST RACIAL ADJUSTMENT IN THE ORGANIZATION OF A PUBLIC SCHOOL SYSTEM AND IN CONSTRUING THE STATUTE TO MEAN THAT BUSING SHOULD NOT BE RESORTED TO BUT AS FLATLY PROHIBITING BUSING.

III. IN HOLDING IN SUBSTANCE THAT THE STATE HAS NO CONTROL OVER THE EXPENDITURE OF ITS FUNDS, BUT, TO THE CONTRARY, MUST EXPEND ITS FUNDS ACCORDING TO THE DICTATION OF THE FEDERAL COURT.

IV. IN FAILING TO DISMISS THE ACTION AS AGAINST THE STATE OFFICIALS WHO ARE NOT CONCERNED WITH THE BUSING OF THE PUPILS WHICH IS PURELY THE FUNCTION OF THE LOCAL SCHOOL UNITS.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

N.C.G.S. 115-176.1 (The portion of this statute as quoted above); *Article 22 of Chapter 115* of the General Statutes of

North Carolina (Dealing with the rights and duties as to the busing of public school pupils).

Section 115-176.1 of the North Carolina General Statutes is constitutional

This portion of the statute simply prohibits compulsory attendance or assignment of any pupil to a public school on account of race, creed, or national origin, for the express purpose of creating a balance or ratio of race, religion or national origins. It also prohibits involuntary busing of students "in contravention of this article" and provides that public funds shall not be used for such busing.

This is in line with the enactment of the Congress in the Civil Rights Act of 1964. In the definition of "desegregation" in subsection (b) of 42 USC 2000c it is expressly said: "'Desegregation' shall not mean the assignment of students to public schools to overcome racial imbalance." Likewise, in 42 USC 2000c-6, it is provided in subsection (a) (2), as follows:

> "Provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."

Apparently Senator Humphrey, when this matter was being debated on the floor of the Senate, held an opinion quite contrary to the order of the Court in this matter. In 110 Congressional Record 12717, we find the following:

> "Mr. Humphrey * * * I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration * * * . The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools * * * . The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language in Section 4."

It is submitted that the definition of "desegregation" is on a par with the congressional definition, which is found in subsection (b) of 42 USC 2000c, which is as follows:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

If the first sentence of the State Statute is therefore unconstitutional, then the Congressional Act is likewise unconstitutional and invalid. If this sentence is unconstitutional, then that portion of the State statute which forbids exclusion from a school on the basis of race is also uncontstitutional for these two statutory prohibitions are different statements of the same thing. The first of these provisions says to the school authorities that you cannot require a child because of his race to stay away from any given school. The second provision says to the school authorities you cannot require a child, because of his race, to enter any given school. The thrust of these two provisions is that school attendance based entirely on race is prohibited.

The holding of the 3-Judge Federal Court in this case should be scrutinized closely from a constitutional standpoint. What the District Court has done, as well as courts elsewhere, is simply to convert a civil right or civil liberty into a civil obligation analogous to the obligation of compulsory conscription for military purposes.

The whole scheme of busing pupils on a racial basis to remove a racial imbalance in a public school is not only a dictatorial exertion of power on the part of the judiciary but is a confusion between civil rights and civil obligations. It means that parents and pupils must submit to the judge's choice of the schools they shall attend based upon the color of their skin to accomplish a fictitious governmental purpose. It simply means that black people or white people are directed by judicial dictat to go to one school rather than to another. Judicial dictation or tyranny by an all-powerful government is not removed because it is done in the name of equality. In

other words, black people, or, for that matter, white people, are under a governmental obligation to associate with whomever the government chooses because the government has decided to compel such association, and, therefore, the civil right to associate with whomsoever citizens choose to associate with is not a right but a governmental obligation. If this doctrine is pushed to the limits of its logic, then the Fourteenth Amendment is constitutional authority for totalitarianism for the government can deprive citizens of their rights or of their civil liberties if it merely deprives all citizens equally of such liberty or right.

If a black person enters a common carrier, such as a bus, he has a right to sit down at the front of the bus where the white people were formerly accustomed to having their seats, or he has a right to go to the back of the bus where the black people were formerly seated. He may choose any seat on the bus he desires, but if he decides to sit at the back of the bus, it is submitted that the bus driver has no constitutional right to go back and seize him by the collar and drag him up to front of the bus. In this connection certain language in the case of BRADLEY v. SCHOOL BOARD OF RICHMOND, 345 F. 2d 310, 315, 316 (4th Cir. 1965), the Court dealt with the argument of certain black plaintiffs who wished their children to attend schools predominantly attended by black people. The Court said:

> "To that extent, they (plaintiffs) say that, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice. * * * There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous."

There is nothing in Brown I or Brown II that supports the ruling of the Court (BROWN v. BOARD OF EDUCATION, 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873; BROWN v. BOARD OF EDUCATION OF TOPEKA, 349 U. S. 294,

99 L. ed. 1083, 75 S. Ct. 753). It is noticeable, and, in fact, it should be emphasized, that Brown II is utterly silent as to redressing racial imbalance, but, to the contrary, deals with school districts and attendance areas. The Court said:

> "The burden rests upon the defendants to establish at such time as is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

It is submitted, therefore, that nondiscriminatory zoning or attendance areas related to the neighborhood school to which pupils are admitted on a nonracial basis is the proper solution (see: BELL v. SCHOOL CITY OF GARY, INDIANA (CCA-7), 324 F. 2d 209, cert. den. 377 U. S. 924; UNITED STATES v. JEFFERSON COUNTY BOARD OF EDUCATION (CCA-5), 372 F.2d 836, 879; DEAL v. CINCINNATI BOARD OF EDUCATION, 369 F. 2d 55 (CCA-6), cert. den. 389 U. S. 847; BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA v. BRAXTON (CCA-5), 402 F. 2d 900; DOWN v. BOARD OF EDUCATION OF KANSAS CITY (CCA-10), 336 F. 2d 988, cert. den. 380 U. S. 914; BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS v. DOWELL (CCA-10), 375 F. 2d 158, cert. den. 387 U. S. 931; GRAVE v. BOARD OF EDUCATION OF NORTH LITTLE ROCK, ARKANSAS SCHOOL DISTRICT, 299 F. Supp. 843).

The mention of the school transportation system in Brown II refers to the existing school transportation and not to the creation of new transportation systems to redress racial imbalance.

An examination of the orders entered by District Judge McMillan, as shown in the Appendix to Petition for Certiorari

in No. 1713, October Term, 1969, already before this Court, will show that the District Judge has proposed to organize the public schools of Charlotte on the basis of mathematical ratios and not only do this but keep students in constant motion, moving from one school to another during the term, based upon computer calculations.

If what we have said as to the constitutionality of the first sentence in the judgment below is true, then the second sentence, which prohibits the expenditure of public funds for involuntary busing to redress racial imbalance, is also a valid exercise of State power.

> *The statute does not prohibit normal transportation for a public school system. It only prohibits busing to relieve a racial imbalance or to provide public schools whose attendance is based on mathematical ratios.*

It seems quite clear to us that the 3-Judge Court has misconstrued the language of the statute. Among other things, the Court said:

> "Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both, can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of State policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid."

What the Court is really saying is that students may be bused to rectify a racial imbalance or to conform to a mathematical ratio. In another part of the opinion the Court said:

> "The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily busing students on account of race, or in order to racially 'balance' the school system."

What the Court has really said is that there must be a unitary system without defining the unitary system. The Court has also said that students may be bused to establish racial balance, or, in other words, to correct a racial imbalance, which is the very thing prohibited by the Civil Rights Act of 1964. It seems strange that the Congress can prohibit this course of action and yet the State cannot prohibit the same course or type of action. The Court furthermore assumes that busing to redress racial imbalance is a constitutionally approved governmental objective and is a required constitutional obligation which has yet to be decided, and as far as this Court has gone is to say that a unitary system was one "within which no person is to be effectively excluded from any school because of race or color." (ALEXANDER v. HOLMES COUNTY BOARD OF EDUCATION, 396 U. S. 19, 90 S. Ct. 29, quoted in concurring opinion in NORTHCROSS v. BOARD OF EDUCATION OF MEMPHIS, ____ U. S. ____, 25 L. ed. 2d 246, 90 S. Ct. ____) Thus it will be seen that the Court has exceeded that part of the definition already given.

The Court also overlooks the fact that neither the local board of education nor the State defendants are compelled to operate a transportation system.

In Section 115-180 of the General Statutes of North Carolina it is said:

> "Each county board of education, and each city board of education is hereby authorized, but is not required, to acquire, own and operate school buses for the transportation of pupils enrolled in the public schools of such county or city administrative unit and all persons employed in the operation of such schools within the limitations set forth in this subchapter. Each such board may operate such buses to and from such of the schools within the county or city administrative unit, and in such number, as the board shall from time to time find practicable and appropriate for the safe, orderly and efficient transportation of such pupils and employees of such schools."

The State Board of Education has no authority over the transportation of pupils. In a portion of Section 115-181 of the General Statutes of North Carolina we find the following:

> "(a) The State Board of Education shall not have authority over or control of the transportation of pupils and employees upon any school bus owned and operated by any county or city board of education, except as provided in this subchapter.
>
> "(b) The State Board of Education shall be under no duty to supply transportation to any pupil or employee enrolled or employed in any school. Neither the State nor the State Board of Education shall in any manner be liable for the failure or refusal of any county or city board of education to furnish transportation, by school bus or otherwise, to any pupil or employee of any school, or for any neglect or action of any county or city board of education, or any employee of any such board, in the operation or maintenance of any school bus."

The State Board of Education does allocate to the respective county and city boards of education all funds appropriated from time to time by the General Assembly for the purpose of providing transportation to the pupils enrolled in the public schools within the State. These funds are allocated according to the number of pupils to be transported, the length of bus routes, road conditions and all other circumstances affecting the cost of transportation of pupils. The Superintendent of Public Instruction of the State has no duties in regard to transportation and the Governor of the State has no duties relating to school transportation. The Supreme Court of North Carolina has construed these statutes to relieve the State Board of Education from all duties in the field of transportation (HUFF v. BOARD OF EDUCATION, 259 N. C. 75, 130 S. E. 2d 26; BROWN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 267 N. C. 740, 743, 149 S. E. 2d 10). And in the case of SPARROW v. GILL, 304 F. Supp. 86 (1969), a 3-judge federal court said:

> "The State may allocate its funds on any basis it chooses

—or may cut off funds entirely—so long as it does not capriciously favor one group of citizens over another."

The order of the 3-Judge Court, therefore, requires the State to furnish funds to provide public school busing to redress a racial imbalance even though the amount of such funds exceeds the amount appropriated for normal transportation or exceeds the entire appropriation of the General Assembly. We do not contend that school boards are prohibited from changing the racial organization of any particular school facility to provide constitutional schools and that buses may be used to transport to any of the facilities. We do contend that children cannot be changed around and bused far beyond the school in a pupil's residence area simply to redress racial imbalance or that pupils may be moved around during the school term to maintain mathematical ratios.

The holding of the 3-Judge Court deprives the State of control over its funds.

While we have already discussed to some extent this subject, it should be stated that we are not aware of the proposition that a 3-judge federal court may order a State to expend its funds in a particular manner or to require the General Assembly of a State to appropriate funds according to the federal court. It has not yet been held by this Court that a State is required and that it is its constitutional duty to furnish funds according to some federal judicial formula.

The Court erred in failing to sustain the Motion to Dismiss all of the State defendants.

All federal judges in the State of North Carolina, except one, have held that the State Board of Education, the State Superintendent of Public Instruction and other State officers do not control and administer the public school system but such power is lodged in the local units (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163; DILDAY v. BOARD OF EDUCATION, 267 N. C. 438, 148 S. E. 2d 513; IN RE HAYS, 261 N. C. 616, 135 S. E. 2d 645; BLUE v. DURHAM PUBLIC SCHOOL DISTRICT, 95 F. Supp.

441; JEFFERS v. WHITLEY, 165 F. Supp. 951; McKISSICK v. DURHAM CITY BOARD OF EDUCATION, 176 F. Supp. 3).

In the case of COVINGTON v. EDWARDS, CCA-4, 264 F. 2d 780, the United States Court of Appeals for the Fourth Circuit upheld this same principle. The 3-Judge Federal Court, therefore, should have dismissed this action against all the defendants. The defendant, Judge McLean, should not have been restrained from proceeding with the suit in the State Court (MITCHELL v. DONOVAN, No. 726, October Term, 1969, Opinion filed June 15, 1970; ATLANTIC COASTLINE RAILROAD v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS, No. 477, October Term, 1969, Opinion filed June 8, 1970).

CONCLUSION

We conclude, therefore, that this Court should accept jurisdiction in this case. We further assert that quotas for religious minorities are not approved; quotas have been revised in our national immigration laws; quotas in alien employment rights have not been approved. We submit that quotas should not be approved in the public school system as between the races anymore than proportional representation in the jury system which this Court has expressly diapproved. Black pupils are entitled to go to the public schools on the same basis as white pupils and all this Court has decided in the *Brown Cases* is that the State must eliminate State sources of racial discrimination.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil No. 1974

JAMES E. SWANN, et al, — Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, — Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, — Additional Parties Defendant.

CIVIL NO. 2631

MRS. ROBERT LEE MOORE, et al, Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiff's motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. Braxton Craven
United States Circuit Judge

John D. Butzner, Jr.
United States Circuit Judge

James B. McMillan
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil No. 1974

JAMES E. SWANN, et al., Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, Additional Parties Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al., Plaintiffs,

versus

CHARLOTTEE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr. Andrew A. Vanore, Jr., Assistant Attorney General, for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to de-

segregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education,* in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the con-

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1. On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

2. There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

stitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools,* was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such

attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g.*, *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23,

1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing

more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegrate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a) (2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United*

3.

§ 2000c:

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

States v. School Dist. 151 of Cook Co., 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U. S. 350 (1962); *Bailey v. Patterson*, 369 U. S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U. S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U. S. 430 (1968), the Supreme Court declared that a school board

must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the cirumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U. S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, ... U. S. ....., 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U. S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[4]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly

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4. The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, or national origins from the community.

Northcross v. Bd. of Ed. of the Memphis City Schools, ... U. S. ....., 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U. S. 483 (1954) *(Brown I)*.

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to

> attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U. S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U. S. 294 (1955) (*Brown II*), and *Brown v. Bd. of Ed of Topeka*, 347 U. S. 483 (1954) (*Brown I*), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v.*

School Bd. of New Kent Co., 391 U. S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, ... U. S. ....., 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment —contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U. S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any

reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V.

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al, Plaintiffs,

v

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties Defendant

DESIGNATION OF THREE-JUDGE COURT

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above-entitled has been instituted in the United States District Court for the Western District of North Carolina, and that a motion and application for restraining order and other relief have been filed in this action which do or may raise the question of the constitutionality of Section 115-176.1 of the General Statutes of North Carolina, commonly spoken of as the "anti-bussing" statute and which application and motion also raise other questions; and that application for relief as set out in the pending motion and order was made to James B. McMillan, United States District Judge for the Western District of North Carolina, who has notified the undersigned, pursuant to Section 2284 of Title 28, United States Code, of the pendency of such application to the end that a court of three judges may be constituted in accordance with Section 2281, Title 28, United States Code.

Now, therefore, I do hereby designate Honorable J. Braxton Craven, Jr., United States Circuit Judge, Fourth Judicial Circuit, and Honorable John D. Butzner, Jr., United States Circuit Judge, Fourth Judicial Circuit, to serve with the Honorable James B. McMillan in the hearing and determination of the above-entitled action, as provided by law, the three to constitute a district court of three judges as provided by Section 2284, Title 28, United States Code.

This the 23rd day of February, 1970.

Clement F. Haynsworth, Jr.
Chief Judge - Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al, Plaintiffs,

v

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties Defendant

NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE-JUDGE COURT

Several orders, starting April 23, 1969, have been entered by this court dealing with pending motions for desegregation of the Charlotte-Mecklenburg schools. The orders of December 1 and December 2, 1969, and February 5, 1970, are attached as Exhibits A, B and C to this motion.

The December 2, 1969, order appointed Dr. John A. Finger, Jr. to assist the court in the preparation of a plan for the desegregation of the schools. The February 5, 1970, order directs the schools to be desegregated according to various principles described or referred to in the order, including the requirement erroneously advertised as "involuntary bussing to achieve racial balance" which reads as follows:

> "That transportation be offered on a uniform nonracail basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance."

A suit has been filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, No. 70-CVS-1097, entitled "TOM B. HARRIS, G. DON ROBERSON, et al, Plaintiffs, vs. WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools, and CHARLOTTE BOARD OF EDUCATION, Defendants," and pursuant to allegations made in that action, Judge W. K. McLean, of the Superior Court of North Carolina, has entered an order temporarily restraining the School Board and the Superintendent from paying Dr. Finger's bills until they have been approved by the Board of Education, and ordering that "the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the

Charlotte-Mecklenburg School System from one school to another and from one district to another district."

The complaint, the amended complaint and the two orders of Judge McLean dated February 12, 1970, are attached hereto as Exhibit D.

The Governor of North Carolina has made a public statement, Exhibit E, and has written a letter to the Department of Administration, Exhibit F.

The State Superintendent of Public Instruction, a party to this case, has made a public statement, Exhibit G.

Reports received from the School Board on February 12, 1970, and February 19, 1970, fail to mention Judge McLean's order, and fail to indicate that the Board have appealed or intend to appeal Judge McLean's order; and these reports also reveal no action by the Board or school staff addressed to the transportation problem. It appears that whether the action of Judge McLean and the other state officials do or do not directly conflict with this court's orders, the practical effect of those actions is or may be to delay or defeat compliance with the orders of this United States Court.

The plaintiffs have filed a motion to make additional parties, and have requested this court to enter orders dissolving Judge McLean's restraining orders and directing the Governor, the State Department of Instruction and the "Concerned Parents Association" and their attorneys and others not to interfere further with the compliance of the school Board with the orders of this court.

Some of the issues raised by this situation may involve the constitutionality of a state statute and others may be matters cognizable by a single judge.

It appearing to the court that pursuant to Title 28, U.S.C.A., this matter should be heard and determined by a district court of three judges.

NOW, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 19th day of February, 1970.

James B. McMillan
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al, Plaintiffs	)	
v	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, Defendants	)	CIVIL ACTION NO. 1974

SUPPLEMENTAL COMPLAINT

I.

This Supplemental Complaint is a proceeding for a temporary restraining order and a preliminary and permanent injunction against the enforcement of the portions of North Carolina General Statutes §115-176.1, (Chapter 1274 of the Session Laws of the 1969 General Assembly of North Carolina, ratified on July 2, 1969, a copy of which is attached hereto as Exhibit A) which reads:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race,

religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

In addition, plaintiffs seek a declaratory judgment that the statutory provisions complained of are unconstitutional on their face and as applied.

II.

A. Jurisdiction of this Court is invoked under 28 USC § 1343, this being a suit in equity authorized by 42 USC § 1983 to redress the deprivation, under color of North Carolina Law, of rights, privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

B. Jurisdiction is further invoked under 28 USC § § 2281 and 2284, this being a suit for a temporary restraining order, an interlocutory and permanent injunction restraining the enforcement, operation and execution of portions of North Carolina General Statutes § 115-176.1 and requiring the convening of a three-judge Federal Court. Jurisdiction is further invoked under 28 USC § § 2201 and 2202, this being a suit for a declaratory judgment declaring the unconstitutionality of portions of North Carolina General Statutes 115-176.1.

III.

A. The plaintiffs bringing this Supplemental Complaint are those plaintiffs who originally brought this action styled James E. Swann, et al., v. Charlotte-Mecklenburg Board of Education, Civil Action No. 1974, which was filed on January 12, 1965.

B. This Supplemental Complaint, as the original complaint, is brought on behalf of the individual plaintiffs and other black students and parents similarly situated, pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of such other black students, who are and have been limited, classi-

fied, segregated or otherwise discriminated against in ways which deprive or tend to deprive them of equal educational opportunities because of race or color. The members of the class are so numerous as to make it impractical to bring them all before the Court. A common relief is sought and plaintiffs adequately represent the interests of the class.

IV.

The defendants in this action are:

(a) The Charlotte-Mecklenburg Board of Education, the original defendant in this case, and the individual members thereof heretofore added as defendants by order of the Court dated June 4, 1969;

(b) The North Carolina State Board of Education, a public body corporate of the State of North Carolina, which is charged by the State Constitution and laws with the duty and responsibility of the general supervision and administration of the public schools and educational funds of the State of North Carolina; and

(c) Dr. A. Craig Phillips, who is the elected State Superintendent of Public Instruction of the State of North Carolina, the administrative head of the Public School System of the State and by force of law, a member and the Secretary of the State Board of Education.

V.

Plaintiffs initially commenced this action on January 12, 1965, (Civil Action No. 1974) against the Charlotte-Mecklenburg Board of Education seeking to obtain the elimination of racial segregation in the public schools in Mecklenburg County.

VI.

On July 14, 1969, the Court entered an Order approving a plan submitted by the Board for the desegregation of the schools. The plaintiffs appealed and the decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

(Swann v Charlotte-Mecklenburg Board of Education, 369 F 2d ..... (Fourth Circuit 1966.).)

VII.

A. On September 6, 1968, the plaintiffs moved the Court for further relief contending that the Board was required to take further steps to disestablish the dual school system in Mecklenburg County.

B. On April 23, 1969, the Court, following several days of testimony heard in March, 1969, entered an Opinion and Order Regarding the Desegregation of the Schools of Charlotte and Mecklenburg County. The Court found that the schools remained segregated, that the pupil assignment system and the placement of the schools continued to racially segregate the pupils, that the faculties had not been adequately desegregated as previously directed by the Court in 1965 and that the Board was to submit a plan for the desegregation of the schools by May 15, 1969.

C. The Order directed the defendants to submit a plan for the active and complete desegregation of the teachers within the system to be effective in the 1969-70 school year and that the plan should seek to apportion teachers to each school in substantially the same ratio (3 to 1) as the ratio of white teachers and black teachers in the system at large.

D. The defendants were also directed to submit a plan and timetable for the active and complete desegregation of the pupils within the system to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970.

E. The Board was directed to consider several methods of desegregation which had been advanced by the plaintiffs, including pairing of grades and schools; feeding elementary schools into junior and senior high schools; combining zones and free choice where each method proceeds logically towards eliminating segregation; bussing and other transportation; setting up large consolidated school units freely crossing city

and county lines to serve larger areas; and to seek aid as may be available from State and Federal agencies.

F. The Court thereafter upon request of defendant, granted an extension of time until May 29, 1969, within which to file its plan.

VIII.

A. On May 15, 1969, the plaintiffs filed a motion for a temporary restraining order seeking to restrain all school construction pending approval by the Court of a school construction plan designed to promote desegregation of the schools.

B. The Board filed its plan on May 28, 1969, as required by the Order of the Court.

C. On June 4, 1969, the Court entered orders setting a date for hearing on the adequacy of the defendant's plan and set forth certain questions to which the parties were to respond at the hearing. In addition, the Court ordered that all members of the Board of Education be added as parties defendant.

D. On June 11, 1969, the plaintiffs filed objections to the plan submitted by the defendant and moved for civil contempt.

E. On June 11, 1969, the defendants moved to set aside the Order of the Court adding the individual Board members as defendants. On June 12, 1969, a similar motion was filed on behalf of the defendant, William E. Poe. The plaintiffs filed a response in opposition to these motions.

F. A hearing was held on the adequacy of the plan and on all pending motions on June 16, 17, and 18, 1969.

IX.

A. The Court entered an Opinion and Order dated June 20, 1969, which was supplemented by additional findings on June 24, 1969.

B. The Court denied the motions of the individual Board members to dismiss and denied plaintiffs' motion for contempt.

C. The Court found that a desegregation plan had been submitted to the Board by the Superintendent, but that the Board struck out virtually all the effective provisions of the plan; that the plan filed as to pupils and teachers was nearly identical to the one previously found racially discriminatory; that the attendance areas of several of the schools were racially gerrymandered; that the defendants had not met their burden to show that the school construction plan would promote the desegregation of the schools.

D. The Court found that desegregation of schools is something that has to be accomplished independent of freedom of transfer.

E. The Court ordered the defendants to prepare and submit by August 4, 1969, a positive plan for the desegregation of the Charlotte-Mecklenburg School System as originally directed on April 23, 1969.

X.

A. The April 23, 1969, Order of the Court contained the following findings by the Court:

> *"The 'Neighborhood School' Theory . . .*
>
> . . .
>
> The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board, today, for example, is transporting 23,000 students on school busses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.
>
> When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which

is quoted above. The neighborhood school theory has no standing to override the Constitution.

Busing. Under North Carolina General Statutes, § § 115-180, the Board is expressly authorized to operate school busses to transport school children; the state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the area presently eligible for bus service. The present cost of school bussing is about $19 for bus operation plus the cost of the bus which is $4,500 per bus should not exceed $20 per pupil a year. In other words, it costs about $40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about $540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school busses for all legitimate school purposes. Busses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses can not be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down."

B. The Court found that 95% of the blacks were concentrated in the western portion of the City of Charlotte and that official action taken on schools, zoning and planning had contributed to this concentration.

XI.

A. On May 7, 1969, a member of the Mecklenburg County House delegation of the North Carolina General Assembly in-

troduced a bill (House Bill 990, a copy of which is attached hereto as Exhibit B) entitled "AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROTECT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE." The Bill, as subsequently amended, was ratified on July 2, 1969 (See Exhibit A), and is now codified as North Carolina General Statutes §115-176.1.

B. The ratified bill, which has the same title as the bill introduced on May 7, 1969, provides:

1. Students cannot be excluded from any school on account of race.

2. Students shall be assigned to the school within the geographical district where the pupil resides, except for children attending special schools or except for any reason the local board deems sufficient.

3. "*No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.*"

4. The article does not apply in temporary situations of unsuitability of schools or over-crowding.

5. Nor does it apply to "any assignment made pursuant to a choice made by any pupil . . . pursuant to . . . a freedom of choice plan voluntarily adopted by the Board."

XII.

The defendants State Board of Education and State Superintendent of Public Instruction are responsible to insure that the prohibitions against involuntary student assignments and bussing contained in North Carolina General Statutes §115-176.1 are complied with in the Charlotte-Mecklenburg School

System and other administrative units throughout the State and that public funds over which they have control not be used for any such bussing.

XIII.

Involuntary bussing and pupil assignments which are prohibited by North Carolina General Statutes §115-176.1 are necessary devices to carry out the existing orders of this and other Federal Courts in North Carolina and to comply with the duties imposed by the Constitution upon defendants herein and other school officials in North Carolina. The purpose, motive and effect of provisions of North Carolina General Statutes §115-176.1 complained of herein, is to forbid these defendants and other school officials in North Carolina from complying with existing lawful orders of this and other Federal Courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution in the State of North Carolina. The provisions thus violate the constitutional rights of plaintiffs and others similarly situated.

XIV.

Plaintiffs and those similarly situated and affected, on whose behalf this action is brought are suffering irreparable injury and will suffer irreparable injury in the future by reason of the provisions of the Statute complained of herein. They have no plain, adequate or complete remedy to redress the wrongs complained of herein other than this action for a declaratory judgment and injunction. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits and would cause further irreparable injury.

WHEREFORE, plaintiffs respectfully pray that, upon the filing of this Supplemental Complaint, the Court:

1. Issue a temporary restraining order restraining the defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing,

administering, or applying the provisions contained in North Carolina General Statutes §115-176.1 complained of herein;

2. Convene a three-judge District Court as required by 28 USC § §2281 and 2284;

3. Advance this cause on the docket and order a speedy hearing of this action according to law and upon such hearing:

a. Enter judgment declaring the statutory provisions complained of herein void as repugnant to the Thirteenth and Fourteenth Amendments to the Constitution of the United States;

b. Enter a preliminary and permanent injunction restraining all defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing, administering, or applying the complained provisions of North Carolina General Statutes §115-176.1;

c. Allow plaintiffs their costs herein, reasonable attorneys fees and such other and further relief as to the Court may appear equitable and just.

Respectfully submitted,

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Attorneys for Plaintiffs

THE NORTH CAROLINA GENERAL ASSEMBLY
1969 SESSION

RATIFIED BILL
CHAPTER 1274
HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE. The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new section of Chapter 115 of the General Statutes to be codified as GS 115-176.1 and to read as follows:

"§ 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of

this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pusuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. TAYLOR, JR.

H. P. Taylor, Jr.
President of the Senate.

Philip P. Godwin

Philip P. Godwin
Speaker of the House of Representatives

NORTH CAROLINA GENERAL ASSEMBLY
1969 SESSION
HOUSE BILL 990

(Public)

Sponsors: Representatives Carson, J. Johnson, and Hege.
Referred to: Education

May 7

A BILL TO BE ENTITLED AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as GS 115-183.1 and to read as follows:

"*GS 115-183.1. Pupil assignment within neighborhood; involuntary bussing prohibited.* Notwithstanding any provisions of this or other Chapters, no pupil shall be assigned to a school outside the district in which he resides except upon the application of his parent, guardian, or person standing in loco parentis as hereinbefore provided.

Pupils residing within a district where two or more schools are located shall be assigned to the school which is closest to their place of residence unless application to attend elsewhere is made by the parent, guardian, or person standing in loco parentis. Applications for assignments outside the pupils' school district or to a school further from the pupils' residence than another school within the district shall be determined by the city or county board as hereinbefore set forth.

The city or county board may, in its discretion and subject to provisions as hereinbefore set forth, provide transportation for pupils assigned either within or without the district. Provided, however, students shall not be bussed or transported out-

side their respective districts or to a school more distant from their residences than another school within the district except in cases where the parent, guardian, or person standing in loco parentis has requested such assignment as hereinbefore set forth. Public funds, whether from taxation or any other source, shall not be used to provide transportation for pupils assigned in contravention of this Article."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants	)	NO. 1974

ORDER

Upon motion by plaintiffs for leave to file a supplemental complaint and add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction for the State of North Carolina as defendants and it appearing to the Court that good cause is shown therefor

It is ORDERED that plaintiffs' motion for leave to file a supplemental complaint and to add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants is granted.

The United States Marshal is directed to serve the supplemental complaint and summons upon the above named defendants.

This 22 day of July, 1969.

James T. McMillan
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLLIPS, Superintendent of Public Instruction of the State of North Carolina, Defendants.	)	CIVIL ACTION NO. 1974

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT, TO ADD ADDITIONAL DEFENDANTS AND FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by their undersigned counsel, respectfully move the Court for leave to file a Suplemental Complaint and for a temporary restraining order restraining the defendants from giving consideration or effect to and from enforcing, administering, or applying certain provisions of North Carolina General Statutes §115-176.1 and as grounds therefor show the following:

1. Plaintiffs seek, by this motion, leave to file a Supplemental Complaint, copies of which are being forwarded this day to the Court together with summonses for service upon the

North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina, parties which the plaintiffs seek to add as defendants to this action. Plaintiffs have served copies of the Supplemental Complaint upon counsel for those defendants now parties to this action.

2. The Supplemental Complaint seeks injunctive and declaratory relief against the following prohibitions contained in North Carolina General Statutes §115-176.1[1]

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

3. For reasons stated more fully in the Supplemental Complaint, plaintiffs allege that the purpose, motive and effect of the statutory provisions complained of therein is to forbid the defendants, now parties to this action, and other school officials in the State of North Carolina from complying with existing lawful orders of this and other courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs allege that this is so because compulsory assignments and involuntary bussing, prohibited by North Carolina General Statutes §115-176.1, are necessary devices for complying with the orders of this Court entered on April 23, 1969, and June 20, 1969, and for complying with constitutional requirements.

4. Plaintiffs seek to add as parties-defendant, the North

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1. North Carolina General Statutes §115-176.1 was enacted as Chapter 1274 of the Session Laws of the 1969 North Carolina General Assembly which was ratified on July 2, 1969. A copy of the Ratified Bill is attached to the Supplemental Complaint as Exhibit A.

Carolina State Board of Education and Dr. A. Craig Phillips, the Superintendent of Public Instruction. These parties are charged by the constitution and laws of the State of North Carolina with the general supervision and administration of the public schools and the disbursement of public funds to the various public schools in North Carolina. They are thus required by North Carolina law to insure that public funds are not spent for involuntary bussing and pupil assignments. They are therefore proper and necessary parties to an adjudication of the constitutional issues raised by the plaintiffs in the Supplemental Complaint. In addition, they are proper parties to this proceeding because, they, together with local school officials have an affirmative duty to take active steps to disestablish the dual school system in Charlotte-Mecklenburg County and other administrative units throughout the State.

5. Plaintiffs, in their Supplemental Complaint, request that a three-judge Court be constituted to determine their constitutional challenge to a statute of state-wide application. This motion for a temporary restraining order is addressed to the single District Court judge hearing this case pursuant to 28 U.S.C. §2284(3).

6. Plaintiffs allege that, unless immediately restrained, the defendants will apply the statutory provisions complained of herein and will thereby fail to comply with the orders of this Court of April 23 and June 20, 1969, thus causing plaintiffs irreparable damage. In support of this allegation, the plaintiffs attach hereto the affidavit of Reginald A. Hawkins, the next friend of plaintiffs in this action.

WHEREFORE, plaintiffs respectfully pray that they be granted leave to file their Supplemental Complaint, that they be allowed to add the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants in this action and that all defendants be restrained from enforcing the complained of provisions of North Carolina General Statutes §115-176.1.

Respectfully submitted,
/s/ Adam Stein

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Attorneys for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs,	)	
v.	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, Defendants.	)	CIVIL ACTION NO. 1974

ANSWER OF THE DEFENDANTS, THE NORTH CAROLINA STATE BOARD OF EDUCATION AND SUPERINTENDANT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, TO THE SUPPLEMENTAL COMPLAINT.

(1) Answering the allegations of Paragraph I of the Supplemental Complaint, these answering defendants allege that the order allowing the plaintiffs to file a supplemental complaint is based upon a motion which was filed in the Office of the Clerk of the Federal Court for the Western District on July 22, 1969, and the order of the Judge of the District Court was also filed on the same date, July 22, 1969, and said order allowing said Supplemental Complaint to be filed is void, invalid and

contrary to due process of law for that the North Carolina State Board of Education and the State Superintendent of Public Instruction were never given an opportunity to appear before the Court and resist said Motion, but, to the contrary, the same is an exparte order entered without service upon the said defendants of any notice or copy of said motion prior to the granting of said order; it is admitted that there is quoted in Paragraph I of the Supplemental Complaint a portion of Chapter 1274 of the Session Laws of 1969 of the General Assembly of this State; it is denied that the plaintiffs are entitled to any preliminary and permanent injunction as against these State defendants or that the plaintiffs are entitled to a declaratory judgment as against these defandants.

(2) Answering the allegations of Paragraph II of the plaintiffs' Supplemental Complaint, it is denied that this Court has jurisdiction as against these State defendants under the Federal statutes cited in said paragraph or under the constitutional provisions cited in said paragraph; it is denied that G. S. 115-176.1 is unconstitutional and invalid or that the plaintiffs are entitled to any declaratory judgment or the convening of a 3-judge federal court; the allegations of Paragraph II are, therefore, untrue, and are denied.

(3) The allegations of Paragraph III are untrue and are denied except the allegation as to the status of the plaintiffs being the same plaintiffs who instituted the original action; it is denied that the plaintiffs are entitled to maintain a class action as against these State defendants.

(4) Answering the allegations of Paragraph IV, these State defendants have nothing to do with the defendants named as the Charlotte-Mecklenburg Board of Education and the individual members thereof, and, therefore, are not required to answer the allegations of subparagraph (a) of Paragraph IV of the Complaint; it is alleged, therefore, that the duties of North Carolina State Board of Education and of Dr. A. Craig Phillips are fixed by State statutes, and, therefore, the allegations of subparagraphs (b) and (c) are denied.

(5) The allegations of Paragraph V are admitted.

(6) The allegations of Paragraph VI are admitted.

(7) Answering the allegations of Paragraph VII, these State defendants allege that the same relate to a motion for further relief filed against the Charlotte-Mecklenburg Board of Education, hearings on same, orders to submit plans of desegregation and matters with which these State defendants are not concerned, and these State defendants allege that they are not required to answer said Paragraph VII.

(8) The allegations of Paragraph VIII of the Complaint relate to matters with which these State defendants are not concerned and of which they have no knowledge or information sufficient to form a belief as to the truth of same, and as to these State defendants the allegations of said paragraph are, therefore, denied.

(9) Answering the allegations of Paragraph IX, these State defendants allege that said allegations relate to matters that these defendants are not concerned with and with which these State defendants have not knowledge or information sufficient to form a belief to form the truth of same and as to these defendants said paragraph is, therefore, denied.

(10) Answering the allegations of Paragraph X, the State defendants allege that whatever appears in the orders of the Court previous to the filing of this Supplemental Complaint are matters or record, and, therefore, they are not required to answer as to same.

(11) Answering the allegations of Paragraph XI, these State defendants allege that the General Assembly of North Carolina at its Session of 1969 enacted into law an Act which is now codified as G. S. 115-176.1 and that said Act was ratified on July 2, 1969; that said Act speaks for itself as to its contents, and except as herein admitted the allegations of Paragraph XI are untrue and are denied.

(12) The allegations of Paragraph XII are untrue and are, therefore, denied.

(13) The allegations of Paragraph XIII are untrue and are, therefore, denied.

(14) The allegations of Paragraph XIV are untrue and are, therefore, denied.

WHEREFORE, having fully answered, these State defendants pray the Court that this action as to the State defendants be dismissed, that the plaintiffs take nothing by their action as to these State defendants and that the State defendants have and recover their costs to be taxed by the Clerk of this Court.

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Attorney General of North Carolina

Ralph Moody
Deputy Attorney General

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Staff Attorney

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al.,
Plaintiffs,
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,
Defendants,
and
HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,
Additional
Parties-Defendant.

CIVIL ACTION NO. 1974

MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF

On February 5, 1970, this Court entered an order directing the Charlotte-Mecklenburg Board of Education and the individual members of the Board to proceed immediately to desegregate the public schools of Charlotte-Mecklenburg County. The Court directed that students be assigned to the various schools under plans presented and adopted by the Board and a plan prepared by the Court's consultant, Dr. John A. Finger. The order provided for changing attendance zones of some schools, pairing of some schools, and transportation of students living beyond "walking distance" from the schools to which assigned. The order further directed that the plan be implemented for elementary schools no later than April 1, 1970 and for secondary schools no later than May 4, 1970. The School Board was specifically directed to begin immediately with steps to implement the plan.

Prior to the filing of the order on February 5, 1970, Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr, and Robert T. Wilson, on their behalf and on the behalf of the Concerned Parents Association, an unincorporated association, brought a proceeding in the Superior Court of Mecklenburg County, by their attorney, William H. Booe, to obstruct and prevent the School Board from implementing the orders directed by this Court. They obtained from the Superior Court of Mecklenburg County an *ex parte* order specifically enjoining the Superintendent from implementing the order of this Court directing the Board to pay the expenses and fees of the Court consultant.

Following the order of February 5, 1970, Tom B. Harris, G. Don Roberson and others of the Concerned Parents Association have sought and are seeking by various means to obstruct and prevent implementation of the Court's orders. On February 12, 1970, they obtained from the Honorable William K. McLean, Judge Presiding in the Superior Court of Mecklenburg County, an order enjoining the School Board from spending

any funds to purchase and operate school buses as directed by this Court.

The Honorable Robert H. Scott, Governor of the State of North Carolina, on February 11 and 12, 1970, objected to the Court's order and directed that no public funds, state or local, be expended for the purpose of implementing the order. The Honorable Dr. A. Craig Phillips, State Superintendent of Public Instruction, and the North Carolina State Board of Education, defendants herein, joined with the Governor in objecting to the Court's order and in directing that no public funds be used for the purpose of implementing the order.

On February 6, 1970, Honorable James Carson, a member of the Mecklenburg Delegation to the North Carolina House of Representatives, threatened to and is preparing to file similar proceedings in the State Court of North Carolina to obstruct and thwart the enforcement of the Court's orders.

These parties, along with divers others, are seeking to obstruct and prevent implementation of the Court's orders directing compliance by the school authorities with their constitutional obligations.

Despite the Court's directive to the School Board to proceed forthwith with all necessary steps to implement the order, the School Board, the State Superintendent and the State Board of Education have failed to do so. Plaintiffs are advised that no efforts have been made to secure the necessary buses for transporting students as directed by the Court. Plaintiffs are also advised that such buses as may be necessary can be ordered and manufactured by the time directed by the Court for implementation of the plan. The failure of the School Board to act now in securing the necessary facilities for transportation may prevent desegregation of the schools in the time directed.

Plaintiffs are advised, believe and so allege that the activities and conduct of the defendants and each of them are pursuant to a design to thwart, impede and prevent desegregation of the public schools of Charlotte-Mecklenburg County and that the

acts, activities and conduct of the defendants were calculated and intended to incite disobedience of the law and the overthrow of law and order and to coerce, intimidate, and compel school officials from performance of their constitutional responsibilities to desegregate the public schools of this system.

In order to insure full implementation of the Court's order within the time directed, plaintiffs, by their undersigned counsel, respectfully move the Court that the following parties be added as parties-defendant in this proceeding:

Honorable Robert H. Scott, Governor of the State of North Carolina;

Honorable A. C. Davis, Controller of the State Department of Public Instruction;

Honorable William K. McLean, Judge of the Superior Court of Mecklenburg County;

Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr, Robert T. Wilson, and the Concerned Parents Association, an unincorporated association in the Mecklenburg County;

James Carson and William H. Booe.

Plaintiffs further pray the Court for a temporary and permanent injunction dissolving the injunctive orders of the Superior Court of Mecklenburg County entered in the proceeding of Tom B. Harris, et al. v. William C. Self, et al., 70 CVS 1097, and temporarily and permanently restrain any further proceedings in the action.

Plaintiffs further pray the Court for a temporary and permanent injunction against all defendants and all other parties having notice of the Court's order enjoining all parties in this action and all parties having notice of the orders of this Court from initiating or proceeding with any action in any State Court which has the purpose or effect of interfering with outstanding orders in this cause.

Plaintiffs further pray that the Court enter a temporary and permanent injunction restraining the Governor, the State Board of Education, the Controller of the State Department of Public Instruction, and the State Superintendent of Public Instruction from denying State funds or taking any other steps which would prevent or tend to prevent the implementation of the orders of this Court.

Plaintiffs further pray the Court for a temporary and permanent injunction directing the local Board of Education, its members individually, the Governor of the State, the State Board of Education, the State Superintendent of Public Instruction, and all other persons having any authority or responsibility in the administration of the public schools in Charlotte-Mecklenburg County to proceed forthwith with all necessary steps to implement the orders of this Court, including the provision requiring transportation of students living more than "walking distance" from the schools to which they are assigned. Plaintiffs further pray the Court for a temporary and permanent injunction restraining all defendants from taking any steps or action which would inhibit or prevent or tend to prevent compliance with the orders of this Court.

Plaintiffs further pray the Court that they be allowed their costs in this proceeding and reasonable counsel fees.

Plaintiffs further pray that the Court direct the United States Marshal to personally serve a copy of the complaint, the amended complaint, and all orders, including the injunctive order prayed for herein, upon all defendants named herein.

Respectfully submitted,

CONRAD O. PEARSON
203 1/2 East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON AND LANNING
216 West Tenth Street
Charlotte, North Carolina

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al,
Plaintiffs,
-vs-
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,
Defendants,
and
HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,
Additional Parties-Defendant.

ORDER

Upon motion duly made, IT IS HEREBY ORDERED that the following persons and organizations described in the petition of the plaintiffs as additional parties-defendant be, and they are hereby made parties herein:

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina

HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction

HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of North Carolina

TOM B. HARRIS, Charlotte, North Carolina

G. DON ROBERSON, Charlotte, North Carolina

A. BREECE BRELAND, Charlotte, North Carolina

JAMES M. POSTELL, Charlotte, North Carolina

WILLIAM E. RORIE, JR., Charlotte, North Carolina

CHALMERS R. CARR, Charlotte, North Carolina

ROBERT T. WILSON, Charlotte, North Carolina

CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County, North Carolina

JAMES H. CARSON, JR., Attorney, Charlotte, North Carolina

WILLIAM H. BOOE, Attorney, Charlotte, North Carolina

It is directed that service of the following documents be made immediately by certified mail, return receipt requested, upon the additional parties hereby made:

1. MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF, with attached POINTS OF AUTHORITY, served by plaintiffs on February 13, 1970.

2. NOTIFICATION AND REQUEST FOR DESIGNA-

TION OF THREE-JUDGE COURT, dated February 19, 1970, including exhibits referred to therein, as follows:

Exhibit A—OPINION AND ORDER filed December 1, 1969.

Exhibit B—ORDER filed February 5, 1970.

Exhibit C—ORDER filed December 2, 1969.

Exhibit D—Complaint, amended complaint and two orders entered by Judge William K. McLean on February 12, 1970, in suit pending in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, bearing No. 70-CVS-1097.

Exhibit E—Statement made by Governor Robert W. Scott on February 11, 1970.

Exhibit F—Letter dated February 12, 1970, written by Governor Robert W. Scott to Dr. W. L. Turner, Director of the North Carolina Department of Administration.

Exhibit G—Statement made by Dr. A. Craig Phillips on February 11, 1970.

3. DESIGNATION OF THREE-JUDGE COURT, filed February 24, 1970.

The plaintiffs are directed to prepare and file on or before Monday, March 2, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

The other parties are directed to prepare and file on or before Friday, March 6, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

If there is any additional evidence which any party desires to introduce by deposition or affidavit, the court will receive such evidence, in written form, up to and including Friday,

March 6, 1970. It is not contemplated that any more oral testimony in a court hearing will be necessary.

The hearing before the three-judge court will not be an evidentiary hearing, but will be a hearing based upon the record which has been developed by the time of the hearing.

This the 25th day of February, 1970.

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

JAMES E. SWANN, et al., Plaintiffs, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, et als., Defendants. AND HONORABLE ROBERT H. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et als., Additional Parties Defendant.	CIVIL ACTION NO. 1974

ANSWER TO MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF

THE DEFENDANTS, THE NORTH CAROLINA STATE BOARD OF EDUCATION, DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION, ROBERT H. SCOTT, GOVERNOR OF THE STATE OF NORTH CAROLINA, A. C. DAVIS, CONTROLLER OF THE STATE DEPARTMENT OF PUBLIC INSTRUCTION, AND WILLIAM K. McLEAN, JUDGE OF THE SUPERIOR COURT OF MECKLENBURG COUNTY (hereinafter referred to as: STATE OFFICIALS), ANSWERING THE MOTION TO ADD ADDITIONAL PARTIES DEFENDANT, AND FOR FURTHER RELIEF, FOR THEIR ANSWERS ALLEGE:

(1) It is admitted that on February 5, 1970, the District Court of the United States for the Western District of North Carolina entered an order directing the Charlotte-Mecklenburg Board of Education to desegregate the public schools administered by said Board; it is further admitted that the Court ordered that students be assigned to the various public school facilities of said Board under plans adopted by the Board and by the Court's consultant, and all orders and plans are referred to and made a part of this allegation not for the purpose of acquiescing therein or admitting the validity thereof, but for the purpose of showing the action taken by the Court and the action taken by the Board; it is denied that any action to which the motion of the plaintiffs refers was taken by the Charlotte-Mecklenburg Board of Education as a voluntary act on the part of said Board, but, to the contrary, these defendants allege that each such action taken was compelled by orders of the Court; the plaintiffs themselves in their allegations refer to orders of the Court and directives of the Court.

(2) It is admitted that a group of individuals, an unincorporated association by the name of "Concerned Parents Association", instituted an action in the Superior Court of Mecklenburg County and obtained an order from a Superior Court judge enjoining the superintendent from paying expenses and fees of the Court consultant; that said civil action now pending in the Superior Court of Mecklenburg County and all its pleadings, orders and proceedings are hereby referred to and made a part of this Answer; it is further alleged that said "Concerned Parents Association" had a right under the laws of the State of North Carolina to institute said action, which is related to the use of public funds, including the proceeds of taxes collected from and paid by members of the said Association and other persons similarly situated; it is admitted that said civil action in the Superior Court of Mecklenburg County was instituted prior to the filing of the Order of the District Court of the United States on February 5, 1970.

(3) It is admitted that on February 12, 1970, the "Concern-

ed Parents Association" obtained an order from the Judge of the Superior Court of Mecklenburg County, enjoining the Charlotte-Mecklenburg Board of Education from spending any public funds to purchase and operate school buses for the purpose of redressing any racial imbalance. It is denied, however, that said Order was obtained to obstruct the enforcement of any lawful order of the District Court of the United States, but, to the contrary, said Order was obtained to prevent the busing of school children for the purpose of changing the racial composition of the student enrollment in specific public schools by compelling school children to attend a specific public school contrary to the will of their parents solely because of the race of such children, contrary to the Fourteenth Amendment to the Constitution of the United States as construed in BROWN v. BOARD OF EDUCATION, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 ALR 2d 1180, and contrary to the Civil Rights Act of 1964, and Chapter 1274 of the Session Laws of 1969, enacted by the General Assembly of North Carolina; that the Superior Court of Mecklenburg County had a legal right to pass upon the statutes and status of busing pupils and to enter the order therein complained of by the plaintiffs, and the prosecution of the action in the State courts is not subject to injunction or restraint on the part of the District Court of the United States; that the action in the State courts is lawfully brought therein to enjoin the unlawful expenditure of State funds and County funds, these being a matter of State law over which the United States District Court has no jurisdiction.

(4) It is admitted that Robert H. Scott, Governor of the State of North Carolina, ordered and directed that no public State funds be expended for the busing of public school pupils to redress racial imbalance as he had a right and duty to do under the Executive Budget Act of the State of North Carolina inasmuch as he was dealing with and preventing an unlawful expenditure of the State's public funds which are subject to the control of the State of North Carolina and its administrative authorities; that the lawful use which may be made of such funds is a matter of State law and involves no question arising

under the Constitution or laws of the United States; it is further admitted that the State Superintendent of Public Instruction of North Carolina and the defendant, North Carolina State Board of Education, approve the action taken by the Governor of North Carolina in the use of State funds, which, it is alleged, do not belong to the Federal Government, and which are not subject to allocation by agents of the Federal Government; that said action was taken pursuant to the statutes above referred to, which prohibit the use of the said State funds for the busing of public school children for the mere purpose of redressing racial imbalance.

(5) That these defendants, State officials, do not know the motives and intentions of the Honorable James Carson, a member of the House of Representatives of the State of North Carolina, and, therefore, for lack of information and belief deny the allegations related to the Honorable James Carson and also deny the allegations as to the motives and intentions of other persons in relation to said Court order for lack of information and belief.

(6) It is denied that the North Carolina State Board of Education and the State Superintendent of Public Instruction have any statutory duties or any duties at all in regard to the transportation of school children; it is further alleged that the local boards of education are under no legal duty to provide transportation for school children to, from and between their homes and the schools in which said children are enrolled; that said Board of Education has no authority or control over the transportation of pupils in the public school system, and neither the Governor of North Carolina nor the North Carolina State Board of Education is required or permitted to allocate funds for public school transportation of pupils for purposes prohibited by Federal and State statutes; that these defendants, State officials, do not know the intentions of the Charlotte-Mecklenburg Board of Education as to providing school buses for the transportation of school pupils to redress racial imbalance, and, therefore, deny all allegations relating to said subject.

(7) It is denied that these defendants are seeking to prevent desegregation of the public schools administered by the Charlotte-Mecklenburg Board of Education or to thwart any proper activity of this Court; it is further denied that these defendants are inciting disobedience of the law and seeking the overthrow of law and order or to coerce, or compel, school officials to desist or refrain from any duty imposed upon them by the Constitution or laws of the United States; that these defendants, State officials, are informed and believe, and so allege, that they have no authority to and may not lawfully be required to use State public funds contrary to the provisions of Chapter 1274 of the Session Laws of 1969, which expressly prohibits the use of such funds for the purpose of financing the transportation of public school children to, from and between their homes and the school wherein they are enrolled for the purpose of changing the ratio of the children of the respective races attending such schools or any other school; that A. C. Davis is Controller of the State Board of Education and not the Controller of the State Department of Public Instruction; that the said Davis is an administrative officer only, and, as such, does not determine the policy of the State of the expenditure of public State funds for public school transportation and is not a proper and necessary party to this action; that the Governor of North Carolina is not a proper and necessary party to this action and should not be added as a party defendant, and such addition would constitute a suit against the State as prohibited by the Eleventh Amendment to the Constitution of the United States; that the Honorable William K. McLean is a Judge of the Superior Court of the State of North Carolina, and, as such, has the lawful right, authority and duty to hear and determine any and all civil actions instituted in any such Court over the sessions of which he is lawfully assigned to preside; that the action instituted on or about February 12, 1970, in the Superior Court of Mecklenburg County, to which reference is made in the motion of the plaintiffs in the present action, was lawfully instituted therein and it is the lawful right, authority and duty of the Honorable William McLean, or such

other judge as may from time to time be lawfully assigned to preside over the sessions of said Court, to hear and determine, subject to lawful appellate review, all issues of law and fact which have arisen or may arise in such action, and he may not lawfully be restrained from the lawful exercise of such jurisdiction and authority by the Order of this Court; that under the appropriate Federal statute of the United States Code (28 USCA 2283) he is immune from any restraint on the part of this Court which would prohibit him from hearing and lawfully determining the issues of law and fact in civil actions lawfully initiated in the said Superior Court, including said action to which the Motion of the plaintiffs in this action refers, and he is immune from restraint on the part of the Federal Court in the exercise by him of the said jurisdiction and authority to hear and determine, subject to lawful appellate review, all issues of law and fact arising in the said action, and, therefore, he may not lawfully be made a party to this action in this Court.

(8) That the plaintiffs are not entitled to a temporary or permanent injunction restraining the actions of these defendants, said State officials, nor are the plaintiffs entitled to any mandatory injunction requiring these defendants, State officials, to proceed with providing transportation to or for public school students; that all allegations as to issuance of injunctions relating to these defendants, State officials, are untrue and are denied; it is denied that as to these defendants, State officials, the plaintiffs are entitled to any costs or counsel fees.

WHEREFORE, having fully answered said Motion, these defendants, State officials, pray the Court as follows:

(a) That as to these defendants, State officials, the said Motion be dismissed;

(b) that all applications and requests for injunctions relating to the busing of the public school pupils for the redress of racial imbalance, or for any other purpose, as to these defendants, be dismissed and denied;

(c) that the plaintiffs' request for costs and counsel fees as to these defendants be denied;

(d) for such other and further relief as to the Court may seem proper and just, and that these defendants recover their costs incurred herein.

Robert Morgan
Attorney General of North Carolina

Ralph Moody
Deputy Attorney General

Andrew A. Vanore, Jr.
Assistant Attorney General

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

James E. Swann, et al,)
Plaintiffs,)
)
-vs-)
) CIVIL 1974
The Charlotte-Mecklenburg Board of Education, et al,)
)
Defendants.)

DEPOSITION OF:
JAMES H. CARSON, JR.
March 11, 1970

By consent this deposition was taken on March 11, 1970, at 11:15 A.M., in the offices of Chambers, Stein, Ferguson & Lanning, Attorneys at Law, 216 W. 10th Street, Charlotte, North Carolina.

By consent all objections except as to the form of the question are waived and objections will be made and ruled on at the time of trial. With the consent of all counsel, signature is waived.

APPEARANCES:

Plaintiffs—Julius L. Chambers, Esq.
Attorney at Law
Charlotte, North Carolina

Adam Stein, Esq.
Attorney at Law
Charlotte, North Carolina

Defendants—William J. Waggoner, Esq.
Attorney at Law
Charlotte, North Carolina

JAMES H. CARSON, Jr.,
having first been duly sworn, was examined and testified as follows:

BY MR. CHAMBERS:

Q Would you state your name, please?

A James H. Carson, Jr.

Q What is your address, Mr. Carson?

A 419 Ellsworth Road, Charlotte.

Q What is your occupation?

A I am an attorney.

Q Did you serve as a member of the Mecklenburg delegation to the North Carolina Legislature during the 1969 session?

A Yes, I served as a member from the 36th House District which is composed of only Mecklenburg County.

Q How long have you served in the Legislature?

A I was elected for the first time in 1966 and re-elected in 1968. I'm still in office.

Q Did you during the session of the 1969 Legislature have occasion to propose a bill that has now been enacted and is known as North Carolina General Statute Section 115-176.1?

A Yes, I did.

Q I show you a document which we would like to have marked as Plaintiff's Exhibit 1 for Mr. Carson's deposition. (Carson Deposition Exhibit #1 marked for identification and attached to all copies of this deposition.) I'll ask you if you would state whether that is a copy of the bill that you introduced.

A The exhibit consists of several items, one of which is a copy of the bill I introduced.

Q Would the last two pages of that exhibit be the bill as you originally introduced it?

A Yes, that's correct, the one entitled House Bill DRH 255.

Q And they are the last two pages on the exhibit?

A Yes, that's correct.

Q The third page from the back, which is the fifth page in the exhibit from the front, headed Amendment, dated June 16, '69, would this be a proposed amendment that was also incorporated in the bill?

A Yes, it would.

MR. WAGGONER: May I have a copy of this?

MR. CHAMBERS: I'm sorry.

Q Now, the third and fourth pages from the front, would you state what these two pages are?

A This is a House Committee Substitute for House Bill 990, which is the same bill.

Q Is it amended in any way from the bill as you originally introduced it?

A Yes. A Committee Substitute is used when a bill is rewritten to any degree to get a Committee Substitute rather than the original bill.

Q What changes were made in the Committee Substitute?

A I would have to read both bills to tell you the exact changes. You can see they are both here and the changes included in each of them were made in the Committee Substitute.

Q The first page and the second page of this exhibit, are these also amendments that were added to the bill?

A Yes. These are two amendments that were put into the Committee Substitute when it was considered in the Senate.

Q And were these amendments as indicated on the first two pages adopted by the House and the Senate?

A Yes, they were. They were adopted by the Senate and the House concurred in the Senate amendments.

Q Now, when did you initially propose the bill that subsequently became General Statute 115-176.1?

A By proposed, do you mean when did I introduce it?

Q Yes.

A I do not recall the exact date.

Q Do you recall the month?

A Of my own knowledge, no, I do not recall the month.

Q I show you another document which we would like marked as Plaintiff's Exhibit 2 for purposes of Mr. Carson's deposition. (Carson Deposition Exhibit #2 marked for identification and attached to all copies of this deposition.) Now, this document on the first page contains a news article headed "House Gets Busing Bill", June 12, 1969. To your knowledge would the bill have been presented to the House in June of 1969?

A To the best of my knowledge it was before the month of June when it was first introduced, either in April or May and I don't recall which month.

Q Do you recall whether it was subsequent to the Court's order entered in this case on April 23, 1969?

A No, I do not recall. I believe it was subsequent to that but I do not recall.

Q Now, as initially proposed, what was your purpose or what were you trying to remedy in proposing this bill?

MR. WAGGONER: Objection.

A The purpose of the bill, I think, could be best summed up by the title of the bill, that is, a bill to protect the neighborhood school system and to prohibit the involuntary busing of pupils outside the district in which they reside.

Q As initially proposed did you intend to prohibit consideration of race in the assignment of pupils?

MR. WAGGONER: Objection.

A The original bill does not mention race. It doesn't prohibit it or do anything else with it.

Q Are you familiar with the present provisions of the State in providing transportation for students?

A I'm vaguely familiar with them, yes. I'm not an expert on the subject.

Q Do you know whether the State presently provides transportation for students?

A Yes, I do know that under certain circumstances they do.

Q Do you recall what circumstances?

A To the best of my knowledge they provide transportation for pupils outside cities who live a mile and a half or more than a mile and a half from the school to which they are assigned and inside of cities in areas which have been recently incorporated, I believe since '57, the same provision applies.

Q Are you familiar with the North Carolina constitutional provision that required separation of the races in public education?

A Yes, I am.

Q Are you familiar with the previous practices of this School Board in providing transportation of students on a segregated basis?

A No, I'm really not familiar with it. I imagine it was done but this was some years ago and I'm not that familiar with it now.

Q Do you know whether the School Board has provided transportation, this School Board, for Negro students going to Negro schools and white students going to white schools?

A No, I do not. I have never been on a school bus myself. I lived near the school I attended and I do not know.

Q You do know we have had segregated schools in this system.

A Yes, I do.

Q And you do know that transportation was provided during the period that we had segregated schools.

A I suppose outside of the city it was. Of my own knowledge, though, I do not know.

Q I show you a copy of the exhibit that was attached to the supplemental complaint filed by the plaintiffs in this case which shows the bill with the date May 7. Does that refresh your recollection as to the date of the bill?

A No. I would assume May 7th is correct because it's stamped on the bill but I do not recall of my own personal knowledge.

Q You don't have any reason to believe that it wasn't May 7.

A No, I do not.

Q Now, do you know the number of students in Mecklenburg County who are transported daily to school?

A No, I do not.

Q Do you know the number of pupils transported to school daily across the State of North Carolina?

A No, I do not.

Q Do you know the average mileage traveled by buses each day in transporting students to school in Mecklenburg County?

A I have no idea what that would be.

Q Now, did you know the number of students or the average miles per day traveled when you introduced this bill?

A The average number of students in Mecklenburg County?

Q Yes.

A No, I did not.

Q Or the average number in the State?

A No, I did not.

Q Or the average mileage?

A No, I did not.

Q Do you know the purpose of the State in providing transportation for students?

A I would assume that the purpose is to provide transportation primarily for the rural children who live some distance from school and who would find it difficult to arrange their own transportation.

Q Do you know how long the State has been providing transportation at public expense?

A Ever since I can remember, which would be twenty-five or so years. I'm sure it's been longer than that, though.

Q The proposed amendment that you submitted June 16, 1969, what was the purpose of this amendment?

MR. WAGGONER: Objection.

A This amendment, as best I recall, was aimed at providing some type of temporary assignment whereby if a school were damaged by fire or something else it would require a temporary assignment and would require pupils to be transported to another school district.

MR. WAGGONER: Move to strike.

Q Look at the first two pages of Exhibit 1. The first proposed amendment would strike the balance of the sentence on Page 1, Lines 14 and 15, following the word "various" and would add "races, creeds, colors or national origins from the community".

A Yes, I'm looking at it.

Q Do you know the purpose of that amendment?

MR. WAGGONER: Objection.

A As best I recall, this is a grammatical correction. I don't have House Bill 990 as it was approved by the House as amended by the Senate, but I believe this did not change the substance of the bill and was a grammatical correction.

Q Would you look at the second amendment on the same page?

A Yes.

Q What was the purpose of that amendment?

MR. WAGGONER: Objection.

A I can only give you the purpose as I understand it. These were put in by Senator Edwards of Guilford County and I couldn't testify as to what his purpose was. I can tell you what I think the amendment does.

MR. WAGGONER: Objection, move to strike.

Q Would you tell us what you think the amendment does?

MR. WAGGONER: Objection.

A Yes. It appears to me and as I recall it, the amendment is to cover the cases where you have a vocational school or a school for handicapped children, something of that nature, where you might have one in the entire community that this particular class of children would be assigned to and I believe that is why the Senator introduced this amendment.

MR. WAGGONER: Move to strike.

Q Now, you notice the last phrase in the amendment which reads "or for any other reason which the board of education in its sole discretion deems sufficient".

A Yes.

Q Would you tell us what you understand that provision to mean?

MR. WAGGONER: Objection.

A I understand it to mean just what it says. If the Board of Education in its discretion feels a transfer or reassignment is required that such would be allowed.

MR. WAGGONER: Move to strike.

Q And the statute would not apply in that instance?

A The statute would apply but it would not prohibit such actions.

MR. WAGGONER: Move to strike.

Q Would you consider this an absolute discretion of the School Board?

MR. WAGGONER: Objection.

A What I would consider it really, I think, is meaningless. It's what it says it is. My consideration of it would be a legal conclusion that I don't feel qualified to give.

Q Well, when you voted for the bill, what were your impressions at that time of the meaning of that provision?

MR. WAGGONER: Objection.

A My impression at that time was that it says just what it says right now, or for any other reason which the board of education in its sole discretion deems sufficient.

MR. WAGGONER: Move to strike.

Q Would this permit a Board in desegregating the schools to make assignments that considered race and to transport pupils in order to desegregate schools?

MR. WAGGONER: Objection.

A Would you read that question back, please?

(The Court Reporter reads the question on Page 10, Line 23.)

A I do not feel qualified to state a conclusion of law as to what this would or would not permit any Board of Education to do. This is a matter for the State or Federal Courts to determine and not for me to say.

Q We're trying to get something about the legislative history of the bill and we were interested in your impressions at that time what the meaning of the provision was. I understand that when the bill came back to the House you spoke in favor of the bill including the amendments. Would you give us your opinion, as you understood it at that time, whether this provision would permit a Board to desegregate the schools and to consider race in doing so?

MR. WAGGONER: Objection.

A In my opinion, and it's only my opinion, when the bill came back before the House it was not debated as to the amendments; that as the introducer of the bill I had one of two courses available. I could either move that we concur in the Senate amendment, in which event the bill would become ratified, or move that we do not concur in the Senate amendment, in which case a conference committee would be set up and the bill sent to the conference committee. I did move that the House concur in the Senate amendments. As best I recall, there was no debate on that motion and it passed unanimously. The opinion I had at the time that the bill came back to the Senate, the Board of Education would be allowed a great deal of latitude in assigning or reassigning students and giving them the sole discretion as to what would or would not be sufficient. It would appear to me there would be numerous instances where if the Board felt that such reassignment were required it would be allowed to do so.

MR. WAGGONER: Move to strike.

Q Would you look again at Plaintiff's Exhibit 2. The first news article there attempts to give the purpose of the bill, to preserve the neighborhood school concept, and it says also,

"Carson introduced the bill several weeks ago in the wake of a federal court ruling that ordered more integration of Charlotte-Mecklenburg schools." Would that be a correct statement?

MR. WAGGONER: Objection.

A I am not prepared to state whether or not a newspaper article from some paper not identified by some reporter that I do not know is correct or incorrect. I have testified as to the date that the bill was introduced. I said I had no reason to believe it was other than May 7th. I do not recall the date of any particular court ruling in Mecklenburg County and I think that the record will have to be considered to see whether it was before or after. As to the term "the wake of", I think that's meaningless. I think following or prior to would be a more accurate description.

Q The next paragraph reads: "At that time it was feared that students would have to be bused out of their districts to obey the court order." Would that be a correct statement of your consideration at the time that you introduced the bill?

MR. WAGGONER: Objection.

A My consideration as to what was "it was feared" would be nothing. I don't even know particularly what "it" means. Certainly the possibility of busing was foremost in my mind but as to whether or not this particular article is correct, I have no way of knowing.

MR. WAGGONER: Move to strike.

Q Was not this possibility suggested in the April 23 order of the Court in this case?

A I believe the possibility has been suggested on numerous occasions both before and after April or May and I think it had been coming or the possibility had been forthcoming for a long time, I'd say probably—I don't know—a year or so or more.

Q You do know there was quite some concern at that time in

Mecklenburg County about the order of the Court, the April 23 order.

A There has been a great deal of concern in Mecklenburg County throughout the matter both before and after April of '69.

Q And was it not foremost in your mind at the time you introduced the bill?

MR. WAGGONER: Objection.

A The concern of the people of Mecklenburg County and the State of North Carolina has always been foremost in my mind in introducing any bill.

MR. WAGGONER: Motion to strike.

Q Would you turn to the second page of Plaintiff's Exhibit 2. By the way, the first page is an article from the Charlotte News. The second page is an article from the Charlotte Observer.

A Yes, I'm referring to it now.

Q Is that a correct report of the House consideration on the date indicated?

MR. WAGGONER: Objection.

A I have no way of knowing to my personal knowledge whether it's a correct report of the House consideration or not.

Q Would you turn to the third page?

A Yes, I'm referring to the third page.

Q That is an article from the Charlotte Observer dated June 18, 1969. Would you look at that article?

A Yes, I'm referring to it.

Q Would you look at the last column on that page?

MR. WAGGONER: Let me get through the thing.

MR. CHAMBERS: OK.

A Yes, I have read the final column.

Q Are the quotations there correct?

A Which particular quotations are you referring to?

Q The first quotation is, "Carson replied that Charlotte-Mecklenburg's board was "very interested" in the bill and that he thought "others" would be."

A Yes, I'm confident that the Charlotte-Mecklenburg Board would be very interested in the bill and others would be, too.

Q Did you make the statement?

A I don't recall.

Q Would the second quotation there coming from Representative Fred Mills be correct?

MR. WAGGONER: Objection, hearsay.

A I don't recall.

Q Look down, the report shows a question asked you by Rep. Arthur H. Jones of Mecklenburg regarding any possible conflict between the bill and the decision of the Court should that become law. Would the quotation there coming from you be correct?

A Not completely, no. There could be a conflict or there could not be, depending on what the Local Board decided to do.

Q Do you recall whether you said: "Well, of course, I see a a conflict. If there were no conflict I don't think there would be any need for the bill."

MR. WAGGONER: Objection.

A I don't recall whether I said it or not. I don't deny it, I just don't recall it.

Q You might have said it?

A Yes.

Q You said that there might be . . .

MR. WAGGONER: Objection.

Q There might not be a conflict depending on what the Board decided to do.

A Yes.

MR. WAGGONER: Objection.

Q Will you explain that?

A I'll explain it as I think I do now because I don't have a recollection of what I thought at this particular moment. I think there would be a conflict if the Board were to decide to involuntarily bus students for the sole purpose of achieving a racial balance.

Q Even with the provision in the act that the Board could do anything within its discretion?

MR. WAGGONER: Objection.

A This again calls for a conclusion of law. I don't necessarily think there would be a conflict. There may be one. If the Board took the position that education in Mecklenburg County would suffer and the public school system would suffer but they still wanted to provide transportation for the sole purpose of achieving a racial balance, I don't think the Board would be allowed to do this.

MR. WAGGONER: Motion to strike.

Q Mr. Carson, would you tell us in your opinion your difference between achieving a racial balance and desegregating the schools?

MR. WAGGONER: Objection.

A I think achieving a racial balance would be much easier of the two to define. I think a racial balance in Mecklenburg County would be roughly 70-30 in each school within the county. As far as ending desegregation goes, this, of course, is a most difficult question that I am not competent to

answer and I don't know of anyone who is. The Court decisions have been, to me at least, very ambiguous as to what must be done to end segregation. Whether or not it means assigning all pupils without regard to race, creed, color or national origin or whether it goes further to mean that race, creed, color and national origin must be considered to achieve a mixture of race as far as practical, I just would not feel competent to answer that question.

MR. WAGGONER: Motion to strike.

Q Would you look at the next page, which is an article from the Charlotte Observer dated June 26, 1969.

A Yes, I am referring to that now.

Q Do you recall seeing this article in the paper?

A No, I don't recall seeing this article in the paper.

Q Were you in court in the hearing of this case in August of 1969 when the Court considered the Board's plan that was subsequently approved for the 1969-70 school year?

A I don't recall. I have been at the hearings on two or three occasions for relatively short period of time.

Q Are you familiar with the Board's plan for 1969-70 that provides for reassignment of Negro students from the inner-city schools to white schools?

A You mean the closing of the six or seven schools?

Q Yes.

A Yes, I am vaguely familiar with it. I have not read it myself but I have followed it in the newspapers and through the other media.

Q Are you familiar with the provision of the plan that provided for reassignment of Negro students from overcrowded Negro schools in the inner-city?

A I know that some schools had been closed in the inner-city.

I did not know some were overcrowded and portions of the pupils from the overcrowded schools were transferred out, no.

Q Are you familiar with the provision of the plan that provided transportation for the Negro students to attend the white schools?

A Yes.

Q Do you recall comments by counsel for the School Board at that time about the provision of the statute that authorized the Board to make a reassignment in its discretion?

MR. WAGGONER: Objection.

A I don't recall the comment.

Q Did you consider the reassignment of the Negro students for 1969 and the transportation being provided for them a violation of the bill?

MR. WAGGONER: I object. The witness stated he really hasn't read the plan and doesn't know what it did.

A No, I do not think it would be a violation of the bill. I think the overcrowded portions of it would be certainly within the discretion of the School Board and would be specifically covered by the act. As for the other part, as far as I know the reassignment and transportation was on a voluntary basis and the School Board allowed children who did not wish to be transported to the outer portions of the city to be reassigned to the school closest to their home. And certainly providing transportation for the pupils in the inner-city who wanted to be transported outside would not be prohibited by the bill.

Q That's the voluntary nature of the bill?

A Yes.

Q Now, the Bill prohibits involuntary transportation. Would you define or tell us what you meant by involuntary?

MR. WAGGONER: Objection.

A Yes. The involuntary would refer to the pupils and to their parents or guardians.

Q They would be the ones who would make the decision?

A Yes, as to whether or not they wanted to attend a school near their home or whether they wanted to be transported to another locality.

MR. WAGGONER: Motion to strike.

Q Would that present some conflict with the other provision of the bill that permitted the Board to assign students within its discretion?

A No, I don't think that would present any conflict.

Q If the Board decided to assign students and the students objected, would such assignments be in violation of the act?

MR. WAGGONER: Objection.

A That would depend on a great many circumstances and also would require a conclusion of law from me. I would have to say that under certain circumstances it might and under others it might not.

Q Would you define some of those circumstances that it might?

MR. WAGGONER: Objection.

A That it might be a possible conflict?

Q Yes.

A Yes. As I said, if the School Board decided that they were going to transport pupils merely to achieve a racial balance and that education of any of the students would not be improved but that the School Board felt they had to have such a balance anyway, I think that this would be a conflict.

MR. WAGGONER: Motion to strike.

Q Will you define some of the exceptions where it would not be a conflict?

MR. WAGGONER: Objection.

A Yes. I think if you had a school that was overcrowded or if you had a school that were damaged by fire and the Board felt that the pupils should be assigned to another school, either on a temporary or more than a temporary basis in the case of overcrowding, I think it clearly would not be, whether or not the pupils wanted to go.

MR. WAGGONER: Motion to strike.

Q Suppose you had a segregated school and the Board had to reassign in order to desegregate the school?

MR. WAGGONER: Objection.

A Well, this gets into another difficult question. When you say the Board had to reassign to desegregate, if the constitution requires such an assignment, of course not. If the constitution does not require such an assignment, yes, it would.

MR. WAGGONER: Motion to strike.

Q We discussed this bill previously, looking forward to securing an affidavit from you and you made a statement at that time that you considered the altering of school boundaries and the pairing of schools for the sole purpose of creating a racial balance to be in violation of the act, but the altering of school districts, the pairing of schools and other methods designed to eliminate the effects of past racial discrimination would not necessarily be.

MR. WAGGONER: Objection.

A Yes, that's correct.

MR. WAGGONER: Motion to strike. May I have a copy of the affidavit?

MR. CHAMBERS: It's not an affidavit.

MR. WAGGONER: Well, it's a document.

MR. CHAMBERS: You may.

Q You also stated at that time that you considered the determination of involuntary to be that of the school children and their parents.

A Yes.

MR. WAGGONER: Objection.

Q You also stated at that time that the bill was amended in the Senate to vest the discretion in the Local Board to make alterations in the method of assigning pupils discretionary?

MR. WAGGONER: Objection.

A Yes.

MR. WAGGONER: Motion to strike.

A Within limits.

Q What limits?

MR. WAGGONER: Objection.

A Well, the ones that we have just mentioned.

Q You also made a statement at that time that you did not consider the discretion vested in the Board to be absolute but that some reason must be given, such as a finding that racial balance in the school would promote the educational program or that the constitution requires racial balance in the schools.

MR. WAGGONER: Objection.

A Yes.

Q Is that correct?

A Yes.

MR. WAGGONER: Motion to strike.

Q You made a statement at that time that you did not think that the act would cover the situation where a school was converted from certain grade levels to other grade levels and students residing near the school would be required to be

transported to other schools serving their grade levels except where the distance involved would be extensive and/or there would be other schools in between the schools to which the students were being transported.

MR. WAGGONER: Objection.

A Yes, that's correct. I don't think this particular act applies to that.

MR. WAGGONER: Motion to strike.

Q You also made a statement that in your opinion the act would limit the kinds of plan or approaches that a School Board might follow in seeking to create a racial balance.

MR. WAGGONER: Objection.

A Yes, that's right.

MR. WAGGONER: Motion to strike.

Q You stated that in your opinion a requirement that there be a racial balance of students in each school in the system which also requires transportation would be violative of the act.

MR. WAGGONER: Objection.

A Would you read that question back, please?

(The Court Reporters reads the question on Line 7 above.)

A Yes, that's correct.

Q You stated that in your opinion the pairing of schools or redrawing of attendance lines to achieve a racial balance whether or not transportation of students is required would be a violation of the act.

MR. WAGGONER: Objection.

A Yes, to achieve a racial balance.

MR. WAGGONER: Motion to strike.

A But not to create a unitary school system.

Q To create a unitary school system, then, even though transportation is provided, would not be a violation of the act?

MR. WAGGONER: Objection.

A Not necessarily, no.

MR. WAGGONER: Motion to strike.

Q The April 23 order of the Court authorized the School Board to consider many means for desegregation including transportation. In your opinion would this bill limit the kinds of considerations that a Board might employ to desegregate schools?

MR. WAGGONER: Objection on incompetence and to the forum.

A Not necessarily. Certainly some types of transportation would not be affected at all by the bill. For example, if the Board decided all inner-city students should be given an option of attending the perimeter schools if they desired and provided transportation for them, it certainly would not.

MR. WAGGONER: Motion to strike.

Q Would there be some limitations placed, however, on the methods that a Board might utilize in desegregating schools?

MR. WAGGONER: Objection.

A There would be some limits placed on it, yes.

MR. WAGGONER: Motion to strike.

Q Would you tell us what those limitations would be or some of them might be?

A Yes. An obvious limitation would be the transportation of students across town for the sole purpose of achieving a racial balance.

Q Are you familiar with the plan that was directed by the Court on February 5, 1970?

A Vaguely familiar with it, yes.

Q Would the bill prevent implementation of that plan?

MR. WAGGONER: Objection.

A I would want to know specifically what in the plan you would be talking about before I could answer that.

Q Would it prevent the clustering of schools and the transportation of pupils as the Court directed?

MR. WAGGONER: Objection.

A If it were for the sole purpose of achieving a racial balance, Yes, I think it would.

MR. WAGGONER: Motion to strike.

Q Well, as you presently understand the plan, you're familiar with the clustering of schools directed by the Court, are you not?

A Yes.

Q And the pairing and the transportation provisions also.

A Yes.

Q In your opinion does this bill prohibit the Board from implementing that plan?

MR. WAGGONER: Objection.

A Yes. In my opinion . . . well, the entire plan, yes, I do think it would prohibit it, certain portions of it.

MR. WAGGONER: Motion to strike.

Q Would those portions be the clustering of schools and the transportation of the pupils in the thirty-four schools involved?

MR. WAGGONER: Objection.

A Just so I know exactly what you're talking about, tell me what you mean by clustering of schools as opposed to pairing.

A I guess we're talking about the same thing in clustering and pairing. You're familiar that the order requires that thirty-four schools be paired, ten black and twenty-four white.

A Yes.

Q And provides that transportation be provided for students reassigned for the purpose of desegregating those schools.

A Yes.

Q Now, would the bill prohibit implementation of that order?

MR. WAGGONER: Objection.

A Yes, in my opinion it would to the extent that the order is written.

Q Now, the April 23 order includes the following: "Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Charlotte has followed the local pattern of residential development, including its de facto patterns of segregation. With a few significant exceptions, such as Olympic High School (about 1/3 black) and Randolph Road Junior High School (23% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99+ white); Beverly Woods (100% white); Bruns Avenue (99% + black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100% white); Albemarle Road Junior High (93% white)." Then the Court writes on about the distance people drive to work and to church and to football games and other affairs. Now, to desegregate these recently built schools would the act prohibit the Board from making assignments, assigning blacks to all white schools and whites to all black schools and providing transportation?

MR. WAGGONER: Objection.

A Now, specifically your question is whether or not, without considering all the figures you read out of which I have no personal knowledge but I assume to be correct, the Board would be prohibited from assigning children to achieve a racial balance, is that correct?

Q Well, if the schools were all white and the Board wanted to desegregate those schools by assigning some black kids to those schools and providing transportation, would the act prohibit the Board from doing this?

MR. WAGGONER: Objection.

A I would find that very difficult to answer. If you had a particular situation where, for instance, a particular school district were gerrymandered to include all the pupils of a certain race or to exclude pupils of a certain race, I would say clearly no, they could be redrawn and should be redrawn. But on the other hand, if you're going to transport pupils from one section of town to a distant section of town and at the same time have cross transportation for the sole purpose of achieving a racial balance, then I would say yes, that it would.

MR. WAGGONER: Motion to strike.

MR. CHAMBERS: I have nothing further.

BY MR. WAGGONER:

Q Mr. Carson, there were other sponsors of this bill with you, is this correct?

A That's correct.

Q Who were they?

A Rep. Johnson of Cabarrus County and Rep. Hegge of Davidson County.

Q You're not familiar with their intent insofar as the proposed bill is concerned, are you?

A Well, their intent, I would say, would be the same as mine

and the same as the other members of the General Assembly who gave it overwhelming approval.

Q How many members are there of the General Assembly?

A 170, 120 in the House and 50 in the Senate.

Q Are these gentlemen in a position to pass on the coverage of this bill with respect to the specific facts in Mecklenburg County?

A No. I would say very few would be very familiar with Mecklenburg County. They're from, of course, all across the State.

Q Do you know who proposed the amendments to the bill that you originally proposed?

A The Senate amendments?

Q Yes.

A Yes, I do. Senator Edwards of Guilford County.

Q Do you know his intent?

A Well, I think he thought it would make it a more workable and better bill if it were amended. One or two of the provisions were grammatical in nature.

MR. WAGGONER: I have nothing further.

MR. CHAMBERS: Thank you very much.

****

CERTIFICATE

I, Evelyn S. Berger, Notary Public/Reporter, do hereby certify that James H. Carson, Jr., was duly sworn by me prior to the taking of the foregoing deposition; that said deposition was taken and transcribed by me; and that the foregoing 80 pages constitute a true, complete and accurate transcript of the testimony of the said witness. I further certify that the persons were present as stated in the caption.

I further certify that I am not of counsel for, or in the em-

ployment of any of the parties to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto subscribed my name this 12th day of March, 1970.

Evelyn S. Berger
Notary Public in and for
County of Mecklenburg
State of North Carolina

GENERAL ASSEMBLY

AMENDMENT

Date ..... By: .....

COMMITTEE SUBSTITUTE OF

Amend S. B. ..... H. B. 990

Adopted June 24

(1) Page 1, Lines 14 and 15
by striking the balance of the sentence after the word "various" and re-writing it as follows: "races, creeds, colors or national origins from the community."

(2) Page 1, Line 18
by changing the period after the word "districts" to a semicolon, and adding the following: "provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its

sole discretion deems sufficient.

(3) Page 2, Line 8
by striking the words "not to any" and inserting in lieu thereof the following: "nor to any assignment or"

(4) Page 2, Line 10
between the word "require" and "reassignment" insert the words "assignment or"

(5) Page 2, Line 13
by removing the period and quotation marks after the word "pupil" and adding the following: "or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Signed EDWARDS

SESSION 1969

Introduced by:

Representatives Carson, J. Johnson, and Hege

COMMITTEE SUBSTITUTE TO H. B. 990

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter

115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various race, creed, color or national origin from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States of North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

GENERAL ASSEMBLY

AMENDMENT

Date 16 June '69 By: Carson

Amend S. B. ..... H. B. 990

By adding a new paragraph on page two; line 14, following the word "Article" to read as follows:

The provision of this Article shall not apply to a temporary assignment of pupils. A temporary assignment shall be one for less than the school year resulting from conditions which temporarily render a school unacceptable.

House adopted 6/16/69

Signed JAMES H. CARSON, JR.

NORTH CAROLINA

GENERAL ASSEMBLY

1969 SESSION

HOUSE BILL DRH 255

Sponsors:

Representative Carson, J. Johnson, Hege

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter

115 of the General Statutes to be codified as G.S. 115-183.1 and to read as follows:

"G.S. 115-183.1. *Pupil assignment within neighborhood; involuntary bussing prohibited.* Notwithstanding any provisions of this or other Chapters, no pupil shall be assigned to a school outside the district in which he resides except upon the application of his parent, guardian, or person standing in loco parentis as hereinbefore provided.

Pupils residing within a district where two or more schools are located shall be assigned to the school which is closest to their place of residence unless application to attend elsewhere is made by the parent, guardian, or person standing in loco parentis. Applications for assignments outside the pupils' school district or to a school further from the pupils' residence than another school within the district shall be determined by the city or county board as hereinbefore set forth.

The city or county board may, in its discretion and subject to provisions as hereinbefore set forth, provide transportation for pupils assigned either within or without the district. Provided, however, students shall not be bussed or transported outside their respective districts or to a school more distant from their residences than another school within the district except in cases where the parent, guardian, or person standing in loco parentis has requested such assignment as hereinbefore set forth. Public funds, whether from taxation or any other source, shall not be used to provide transportation for pupils assigned in contravention of this Article."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

HOUSE GETS BUSING BILL

RALEIGH—Rep. James H. Carson's bill to prohibit arbitrary busing of students to create racial balances in schools comes up for floor action today in the House.

The bill has been given a favorable report by the House Judiciary Committee.

Carson's bill seeks to preserve "neighborhood school" concept which means students will be assigned to schools nearest their homes.

Carson introduced the bill several weeks ago in the wake of a federal court ruling that ordered more integration of Charlotte-Mecklenburg schools.

At that time it was feared that students would have to be bused out of their districts to obey the court order.

Carson's bill prohibits the involuntary busing of students outside their school districts. But it does not prohibit busing students if they desire it.

ANTI-BUSING BILL GETS HOUSE OK

By JERRY ADAMS

Observer Raleigh Bureau

RALEIGH—Mecklenburg Rep. James H. Carson's bill that would prevent the busing of school children without parental consent passed its second reading in the N.C. House Monday night.

Rep. Henry E. Frye of Guilford County requested that the bill's final reading be delayed until today. Only one member need request that a bill not receive its second and third reading the same day.

The bill provides that a child must be assigned to the school

nearest his home unless parents consent to his assignment to another school.

Before explaining his bill, Carson added an amendment that would allow busing of a child "under temporary conditions" for less than a school year if, for instance, the originally assigned school burned down.

Carson has explained that the constitutionality of busing has never been tested in the courts, although the idea has been an emotional issue for years and has been suggested by the courts as one means of fostering desegregation.

The New York legislature has passed a similar law.

Frye, the only objector during brief debate over the bill, contended that the bill "doesn't give any discretion at all to the (local) board."

Frye suggested that if the Assembly wanted to express its wishes to local boards of education it would be better advised to pass a resolution—without the force of law. Frye also said that some districts in the state were not rigidly defined and that confusion could result from such a law.

'NO BUSING' BILL ROUSES CRITICS

By JERRY ADAMS

Observer Raleigh Bureau

RALEIGH—Opposition erupted in the House Tuesday to Mecklenburg Rep. James H. Carson's bill to prohibit involuntary busing of public school children.

The bill was detered from final passage and will be reconsidered today.

Opposition came from several quarters on the floor of the

House Tuesday although the bill was passed in its second reading Monday night after only Rep. Henry E. Frye of Guilford opposed it. Frye delayed the final vote until Tuesday when it looked Monday night as though the bill was headed for overwhelming approval by voice vote.

"Some people (the opposers) have had a chance to look at it," Frye said after Tuesday's session, during which he did not speak. "Things were going so well I thought I'd just stay out of it," he said.

The bill would prevent a school board from busing a child without his parents' approval to a school other than that nearest his home.

Busing is a crucial issue in school desegregation, although Carson argues that busing has never received a specific court test. Frye is the General Assembly's only Negro member.

Speaking of another local issue in desegregation, Carson said on the floor Tuesday that his bill "has nothing to do with the freedom-of-choice plan one way or another."

But Rep. Neill I. McFadyen of Hoke said the bill would be impossible to apply in areas where school attendance districts were not precisely drawn.

Saying that he had been chairman of his local school board, McFadyen continued:

"If we tell the boards at home exactly what to do, I don't see why we need these local boards."

Local boards "should have some right to have some freedom of choice," too, McFadyen said.

Rep. Ernest B. Messer of Haywood objected that "shifting population" in a city or county would require that local boards be able to use their own discretion about transferring pupils.

Carson hastily offered an amendment that would suspend

the law in a case where a school building were damaged or where overcrowding required "temporary" busing.

But Messer was still not satisfied.

"I think it is wrong and I think it will create some stumbling blocks throughout this state that we won't realize until we come up against them," Messer said.

Rep. Ike F. Andrews of Chatham asked if local boards "had requested for even approved this bill?"

Carson replied that Charlotte-Mecklenburg's board was "very interested" in the bill and that he thought "others" would be.

Rep. Fred M. Mills Jr. of Anson asked, "Mr. Carson, really don't you want this to apply to just Mecklenburg County?"

Mecklenburg's board is currently locked in a fight with the federal district court, which has offered busing as one solution to a de facto segregated situation that the court says must be resolved.

Mills also raised the question of a parent who might not "even admit" his child needed special education classes for which busing might be necessary.

And Rep. Arthur M. Jones of Mecklenburg asked Carson if he could "see any possible conflict with the bill—should it become law—and the current situation with the courts in Charlotte-Mecklenburg?"

Carson responded, "Well, of course, I see a conflict.

"If there were no conflict I don't think there would be any need for the bill."

Carson said the state attorney general's office had told him the bill was constitutional, "but could be applied unconstitutionally."

When Carson's attempts at amending the bill showed no

signs of mollifying critics, he asked that the bill be reconsidered today.

After the session, obviously delighted with his new-found support in opposition to the bill, Frye said that the bill runs counter to the "trend" of this General Assembly in giving more power to local government.

CARSON'S REWRITTEN ANTIBUSING BILL PASSES IN HOUSE VOICE VOTE

Observer Raleigh Bureau

RALEIGH—Mecklenburg Rep. James H. Carson's bill to prohibit busing of school children without parental consent won final approval in the House of Representatives Wednesday and now moves to the Senate.

The bill, which locks legal horns wtih a desegregation case in Charlotte-Mecklenburg, was passed in a form substantially rewritten from the original.

Rep. Henry E. Frye of Guilford, the General Assembly's only Negro and the member who first opposed the bill, was not present for the vote Wednesday.

Other House members who had questioned whether the bill restricted local school boards too much, also were silent, and the bill passed by an overwhelming voice vote.

The bill prohibits busing of children across attendance-district lines to establish racial "balances or ratios" in any school. The bill also prohibits the use of busing to segregate by race.

Drawn along the lines of a recently passed New York law, the bill conforms to guidelines established by the U.S. Department of Health, Education and Welfare, Carson said.

"In my opinion, the bill probably is constitutional, but it may not be," Carson said.

Federal Judge James B. MacMillan has suggested busing as a means of further desegregating Charlotte-Mecklenburg schools. The schools now are under court order to come up with a plan that will further desegregate, but are in the process of fighting that order in the courts.

Carson cited a Jaycee poll from Charlotte that showed 94.8 per cent of 1,033 persons answering to "favor neighborhood schools."

Black people and white people want neighborhood schools, Carson argued. He was the only one to speak on the bill.

"I don't know what the courts will do, but we can state that the policy of this state is against segregation.

"And it's against involuntary busing of students."

LAW FIRM PLANS TEST OF ANTIBUSING LAW

By NANCY DRACHEY

Observer Staff Writer

A Charlotte law firm said Wednesday it will seek a constitutionality test of the new antibusing law.

The antibusing law, sponsored by Mecklenburg Rep. James H. Carson, received final approval in the N.C. House Wednesday, the last day of the General Assembly session.

The new law prohibits busing for purposes of integration or segregation, requiring a school board to assign children to the school closest to their homes.

Adam Stein, a partner of civil rights lawyer Julius I. Chambers, said their firm would ask the U.S. District Court here to determine the new law's constitutionality.

Normally, the constitutionality of state laws is argued before a court of three federal judges.

Chambers and his firm have represented the Negro parents and teachers who brought the Charlotte-Mecklenburg school desegregation case before the federal court here.

The new law, titled "To Protect The Neighborhood School System," would virtually assure some all-Negro and all-white schools since neighborhoods are segregated.

School Board attorneys Brock Barkley and William J. Waggoner have said the law would have to be obeyed unless it was stricken down in federal court.

Barkley told board members he thought the law was unconstitutional and would be tossed out if tested in federal court.

The antibusing law was approved in the Senate on Tuesday after earlier approval in the House. The Senate tacked on a technical amendment which the House approved Wednesday.

CIVIL RIGHTS LAWYERS WILL TEST BUSING LAW

By KAY REIMLER

News Staff Writer

Charlotte civil rights attorneys plan to take the newly passed state law forbidding involuntary busing to court to try to have it declared unconstitutional.

The law, sponsored by Mecklenburg Rep. James H. Carson

Jr., prohibits busing of children to school to promote segregation or desegregation and requires the assignment of a child to the school nearest his home.

J. LeVonne Chambers, the attorney who brought the desegregation suit against the School Board, told The News today that his office will test the law in the court.

CHAMBERS said he has "no idea" when the case might come up.

The case, he said, will be heard before a panel of three federal judges, not necessarily from North Carolina, appointed by the chief judge of the U.S. Fourth Circuit Court.

That court is in recess until September, the attorney said, adding that he doesn't know if the three-judge panel could be appointed before September.

The law as it stands could have an effect on any desegregation plan the Charlotte-Mecklenburg School Board might devise.

School attorneys agree that the board must abide by the law until the measure is stricken down in court.

Chambers told The News that a number of similar state laws were struck down by the courts during the late 1950's and early 1960's because they obstructed the desegregation of schools.

If all school children in the Charlotte-Mecklenburg system attend the school closest to their homes, the system would retain a number of racially identifiable schools since many neighborhoods in the county are segregated.

ANTI-BUSING LAW TARGET OF MOTION

By VIVIAN MONTS

News Staff Writer

Civil rights attorneys here today asked the federal court to override a new state law prohibiting involuntary busing of children outside their school districts.

A motion filed this morning by Adam Stein, law partner of J. LeVonne Chambers requested an order by Judge James B. McMillan which would prohibit the Charlotte-Mecklenburg Board of Education from using the law.

The motion was filed in connection with a suit seeking total integration of local schools. The court ruled last spring that schools here must have more desegregation.

Judge McMillan has not yet ruled on the busing request, but has granted an attached request by the attorneys asking that the names of the N. C. State Board of Education and Dr. A. Craig Phillips, state superintendent of public instruction, be added to the list of defendants in the suit.

THE ORIGINAL defendant was the local school board. School Board members were added later as individual defendants in the suit.

The state law the civil rights attorneys are seeking to overturn provides that "involuntary busing of students . . . is prohibited, and public funds shall not be used for any such busing."

The attorneys claim the law, passed July 2, forbids the local school board from carrying out court orders to comply with the school desegregation requirements of the Constitution.

The papers filed this morning state that "this is so because compulsory (pupil) assignments and involuntary busing . . . are necessary devices" for complying with court orders for desegregation of local schools.

Judge McMillan has never required involuntary busing in the local school system but stated in an order April 23 that "there is no reason except emotion . . . why school buses cannot be used by the board to provide the flexibility and economy necessary to desegregate the schools."

The temporary order asked by Stein would be in effect pending a decision by a three-judge panel as to whether or not the state law is constitutional. The civil rights attorneys claim it is not.

The attorneys claim that if the local school board is not immediately stopped from using the state law, its members will fail to comply with Judge McMillan's orders for the desegregation of schools here.

The anti-busing law originated in Mecklenburg County. It was introduced first in the House of Representatives by Mecklenburg Republican Rep. James H. Carson Jr.

School administrators contacted by The News this morning disagreed somewhat with Lt. Stroud's statement on marijuana sales in the schools.

"I question buying on the junior high campus," said Steven D. Wallin, principal at Coulwood Junior High School. "I haven't seen any here or on any other junior high campus."

And Thelbert C. Wright, principal at West Mecklenburg High School, said that "If you can buy that stuff in the big schools, we certainly don't know anything about it."

North Mecklenburg's assistant principal, B. K. Hurd, reacted to Stroud's statement by saying that "he (Stroud) knows something we don't know. I wouldn't be surprised at their being able to get it, but to my knowledge as to it being on our school grounds and being sold, no."

The News was able to contact only a few high school administrators because of the vacation period.

'NO BUSING' LAW IS CHALLENGED IN COURT

By NANCY BRACHEY

Observer Staff Writer

Civil rights lawyers Tuesday challenged the constitutionality of the new N.C. law that prohibits involuntary busing of children for racial balance in the schools.

The law also prohibits assignment of school children outside their attendance district to achieve a racial balance.

Its purpose, motive and effect;" said the law firm of civil rights lawyer Julius L. Chambers, is to prevent school boards in the state from complying with federal court orders for desegregation in compliance with the U.S. Constitution.

The lawyers asked that the new law be sent to a three-judge federal court for a constitutionality test. Pending that decision, they asked U.S. District Judge James B. McMillan to grant an injunction preventing consideration, application, administration and enforcement of the new law.

Chambers' firm filed the complaint in connection with the Charlotte-Mecklenburg school desegregation case, which is before McMillan.

The civil rights lawyers contended that "involuntary busing and pupil assignment" prohibited by the law are "necessary devices" to carry out existing court orders here and elsewhere in N.C. and to comply with constitutional requirements.

They alleged that unless the court prevents it, the Charlotte-Mecklenburg School Board will use the law to sidestep McMillan's court orders of April 23 and June 2 for desegregation of local schools.

The board has until Aug. 4 to present its second try at a desegregation plan for schools and faculties. The first pupil desegregation plan was rejected by the judge June 20.

(McMillan has not told the school board it must transport

students. He has said that the school board may use any means to accomplish desegregation of Charlotte-Mecklenburg schools.)

A number of other school districts in N. C. are also under federal court orders to desegregate this fall and next.

Also Tuesday, the N. C. Board of Education and Dr. A. Craig Phillips, state superintendent of public instruction, were made defendants in the Charlotte-Mecklenbug school desegregation case.

This follows a ruling issued by U. S. District Judge Algernon Butler of Raleigh that education officials have a duty in school desegregation.

The State, however, has announced an objection to Butler's ruling, and says it will appeal any decision that makes the State responsible for school desegregation.

Butler's order said the State officers share with local units the burden to actively seek the desegregation of the public schools.

McMILLAN WILL IGNORE NEW ANTIBUSING LAW

By WARREN KING

Observer Staff Writer

A recently enacted N.C. "antibusing" law apparently has little effect on the Charlotte-Mecklenburg School Board's plan to desegregate local schools.

Federal Judge James B. McMillan said Tuesday that a temporary restraining order on the law, (which prohibits involuntary busing of school children), was not necessary in considering the school board's plan.

Civil rights lawyer Julius L. Chambers asked for the order during a three-hour U.S. District Court hearing Tuesday on the school board's new desegregation plan which included the busing of black students to predominately white schools.

The statute, passed this summer by the General Assembly, prohibits busing of a student against his will.

Mecklenburg School Supt. William Self testified he didn't believe the board was influenced by the law in drawing up the desegregation plan.

The plan turns primarily on the concept of voluntary busing and contains provisions for reassigning students who object to being bused.

Self said he felt the busing was proposed for the same reason seven black schools would be closed under the plan and their students bused to the white schools: "To afford better educational opportunities (for Negro students) and prevent overcrowding (schools that would not be closed under the plan)."

Mecklenburg Rep. James H. Carson Jr., author of the anti-busing law, said in an interview the board was "quite proper" in ignoring the statute. It was not intended to interfere with the board's desegregation efforts, he said.

The law itself contains numerous exceptions that would allow busing, including one nonspecific provision for pupils reassignment because of "other circumstances."

In explaining the school board's position in regard to the law, attorney Maurice Weinstein said during the hearing that the exceptions provided for in the statute "swallow" it.

Weinstein said the state attorney general's office had told him it would seek to further clarify the law in the near future and requested that no action be taken on it during Tuesday's hearing.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

v.

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM OR DISMISS

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IN THE

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OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

v.

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that it is manifest that the questions are so unsubstantial as not to warrant further argument, or, in the alternative, to dismiss the appeal herein on the ground that it is not within the jurisdiction of the Court.

Opinions Below

The opinion of the three-judge district court is reported as *Swann* v. *Charlotte-Mecklenburg Board of Education* (also *Moore* v. *Charlotte-Mecklenburg Board of Education*), 312 F. Supp. 503 (W.D. N.C. 1970).

Jurisdiction

Appellees submit that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case is not a "civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Appellees' argument in support of the contention that a three-judge court was not required appears *infra* in Argument II.

Questions Presented

1. Whether the judgment below may be affirmed on the ground that N.C. Gen. Stat. §115-176.1 was an unconstitutional legislative attempt to nullify rights of the appellees under a prior judgment of a United States District Court, and that the state statute thus violates the Supremacy Clause of Article VI of the Constitution of the United States.

2. Whether the court below was correct in determining that portions of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, are unconstitutional because they interfere with a school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment to eliminate racial segregation in the public schools.

3. Whether the appeal should be dismissed on the ground that no direct appeal from the district court is provided where the case was not one required to be heard by a district court of three judges since:

(a) the case involves an issue under the Supremacy Clause (the conflict of a state law with a prior federal

court order) and thus no three-judge court is required under the doctrine of *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); and

(b) numerous prior decisions of this Court make it plain that the statute is unconstitutional and thus no three-judge court is required under the doctrine of *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Statement

Introduction

This is a direct appeal by the North Carolina State Board of Education and a group of state officials[1] from the order of a three-judge district court ruling that a portion of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, was unconstitutional because it interfered with the affirmative duty of local school boards under the Fourteenth Amendment to desegregate the public schools. A companion appeal involving the same judgment is also pending here as No. 444, O.T. 1970, *sub nom. Moore* v. *Charlotte-Mecklenburg Board of Education*. The proceeding in the three-judge court was an ancillary proceeding connected with the school desegregation case involving Charlotte-Mecklenburg which is also now pending here as *Swann* v. *Charlotte-Mecklenburg Board of Education*, O.T. 1970, No. 281, certiorari granted June 29, 1970.

This direct appeal is in an unusual posture in that it has been scheduled for argument and briefing, prior to any action by the Court on the Jurisdictional Statement. (Order of the Chief Justice herein dated August 31, 1970.) Not-

[1] Appellants herein include the State Superintendent of Public Instruction, the Governor of North Carolina, the Controller of the State Board of Education, and a judge of the Superior Court of Mecklenburg County who issued an order allegedly interfering with the federal court desegregation orders.

withstanding this action, appellees believe it appropriate to file this response to the Jurisdictional Statement because we believe the case involves no substantial issues not previously decided by the Court and because we doubt that the necessary jurisdictional requisites for direct appeal are present under 28 U.S.C. §1253.

Proceedings during 1969-70 before a Single District Judge

The school desegregation case brought by Negro pupils and parents against the Charlotte-Mecklenburg Board of Education was commenced in 1965 and there has been extensive litigation ever since which has culminated in the *Swann* case now pending in this Court. A full statement of the history of the proceedings from 1965 to date is contained in Petitioners' Brief in *Swann*, No. 281, O.T. 1970. The case has resulted in numerous reported decisions which are cited in the note below.[2]

On April 23, 1969, after a plenary hearing, the district judge rendered a decision and order finding that the school system was still unlawfully segregated and directing that that defendants file a plan for complete desegregation of the system (*Swann, supra*, 300 F. Supp. 1358). The court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, transportation or bussing of students and any other method which would effectuate a racially unitary system. Extensive litigation ensued as the board submitted a series of proposals and the court rejected them as unsatisfactory to disestablish the segregated system. In the midst of this

[2] See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D. N.C. 1965), *affirmed*, 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970).

litigation about the remedy to implement the April 23 decision, the North Carolina legislature enacted the anti-bussing bill proposed by a member of the Mecklenburg delegation. The measure which was ratified July 2, 1969, included the following two sentences (later held unconstitutional):

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

Plaintiffs in the *Swann* case promptly obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the above-quoted portion of the anti-bussing law; they asked that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284 (App. No. 281, pp. 460a-479a). However, no three-judge court was convened at that time and the court took no action on the requests for relief because the school board thought that the anti-bussing law did not interfere with the school board's proposed plan to bus about 4,000 black children to white suburban schools (306 F. Supp. at 1295).

After further hearings to consider the board's further proposals during the fall of 1969 and the operation of the interim plan (which involved bussing black children to formerly white schools), the district court finally directed that a plan be prepared by the court's expert consultant. The court consultant's plan was ordered into effect in an order entered February 5, 1970, reported at 311 F. Supp. 265. The February 5 order provides for the alteration of some school attendance areas, the creation of certain "satellite" or non-contiguous zones from which pupils would be transported to school, the pairing and clustering of certain

schools with the alteration of grade structures, and transportation for pupils who live more than walking distance (as determined by the board) from the school to which they are assigned. The pairing and clustering of 10 black and 24 white elementary schools will result in pupils of both races being transported to schools which were formerly segregated. The district court made extensive supplemental findings about the amount of transportation required and its relation to the large school bus transportation system which was already in operation in the community (App. No. 281, p. 1198a).

Obstruction of the District Court Orders; Convening of Three-Judge Court

Following the order of February 5, 1970, numerous citizens, under the banner of "Concerned Parents Association," held meetings to protest the order, vowing to defy, delay, obstruct and in any way prevent its implementation. On January 30, 1970, they filed a proceeding in the Mecklenburg County Superior Court (*Harris* v. *Self*) and obtained an *ex parte* temporary restraining order, purportedly preventing the superintendent from paying the fees and expenses of the court consultant as directed on December 2, 1969. They filed an amended complaint on February 12, 1970, in the Mecklenburg County Superior Court and obtained an amended temporary restraining order which enjoined the Charlotte-Mecklenburg Board of Education from expending any money for the purpose of purchasing or renting any motor vehicle or operating or maintaining such for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg school system from one school to another and from one district to another. The order entered by the Mecklenburg Superior Court on January 30, 1970, was modified to permit payment of the court consultant on approval of the Board of Education.

On February 11, 1970, Governor Robert W. Scott issued a public statement to the effect that North Carolina General Statute §115-176.1 prohibited the involuntary bussing of students, that he had taken an oath to uphold the laws of the State of North Carolina, and that he was directing all officials to enforce this statute. On February 12, 1970, Governor Scott instructed the Director of the Department of Administration that "use of public funds for providing bus transportation shall be strictly in accordance with the appropriations made by the 1969 General Assembly, and for no other purpose. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins" (sic.). Copies of the letter were forwarded to Dr. A. Craig Phillips, the Superintendent of Public Instruction; Dr. Dallas Herring, Chairman of the State Board of Education; Mr. A. C. Davis, the Controller of the State Board of Education; and Mr. Tom White, Chairman of the State Advisory Budget Commission. Shortly thereafter, Dr. A. Craig Phillips issued a similar statement and further advised that he was opposed to bussing. On February 23, 1970, he wrote to Dr. William S. Self, Superintendent of the Charlotte-Mecklenburg Schools and advised, "No additional State funds will be allocated to the Charlotte-Mecklenburg Board of Education to provide bussing of students for the purpose of creating a balance or ratio of students in the schools." On the same date, Mr. A. C. Davis directed a memorandum to the superintendent of each local school system in the State advising that the General Assembly had appropriated funds for the operation of 9,510 buses during the 1969-70 school year and 9,635 buses during the 1970-71 school year. The memorandum advised that approximately 9,443 buses were presently in use and that, "The appropriation does not include funds for the transportation of

thousands of additional students and the operating costs of hundreds of additional buses which might be made necessary by the reorganization of schools. No additional State funds will be allocated to school administrative units to provide bussing of students for the purpose of creating a balance or ratio of students in schools."

On February 13, 1970, plaintiffs moved the court (App. No. 281, p. 840a) to add as additional parties-defendant the Governor of the State; Mr. A. C. Davis, Controller of the State Board of Education; the Honorable William K. McLean, the Superior Court Judge who issued the temporary restraining order, each plaintiff in the Superior Court proceeding and their attorney. Plaintiffs also asked the court to add as additional parties-defendant the Honorable James Carson who initially proposed the statute here in question and who had made several public statements of his intention to file a proceeding in the state court to enjoin the school board from complying with the February 5, 1970, order of the court. Plaintiffs further sought an injunction against the enforcement of the state court restraining order as modified on February 12, 1970, and to enjoin the defendants from further interference with the implementation of the orders of the district court.

On February 20, 1970, the resident district judge entered an order reciting the various events and requesting that the Chief Judge of the Circuit designate a three-judge district court (App. No. 281, p. 845a). A three-judge court was designated on February 24, 1970, and additional parties were added by order of February 25, 1970 (App. No. 281, p. 901a).

Meanwhile, on Sunday night, February 22, 1970, approximately 50 adults on behalf of themselves and their children filed another proceeding (*Moore* v. *Charlotte-Mecklenburg Board of Education*) in the Mecklenburg County Superior

Court seeking to restrain desegregation of the Charlotte-Mecklenburg schools as directed by the district court. At 10:16 p.m. on that Sunday night, the Honorable Frank Snepp issued an *ex parte* temporary restraining order enjoining the Charlotte-Mecklenburg Board of Education and its Superintendent

> from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color.

On Thursday, February 26, 1970, the board removed the *Moore* case to the United States District Court. At a special meeting of the board on Friday, February 27, 1970, the board chose to comply with the order of the state court rather than the orders of the federal district court. The Superintendent announced that all planning and activities then underway for implementation of the district court's order of February 5, 1970, were terminated. On the same date, plaintiffs moved the court to add the plaintiffs in the *Moore* case, their lawyers and the Honorable Frank Snepp as additional parties-defendant in this case. Plaintiffs further sought an order enjoining the enforcement of the state court order and enjoining any further efforts by all of the defendants from taking steps which would prevent or inhibit the implementation of the orders of the district court. Plaintiffs also sought an order finding all members of the Charlotte-Mecklenburg Board of Education and its Superintendent in contempt and imposing a fine or imprisonment for each day that the defendants failed to comply with the court's orders.

The district court on March 6, 1970, entered an order decreeing that the order by Superior Court Judge Snepp in the *Moore* case "is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970" (App. No. 281, pp. 925a-927a). The three-judge court eventually ruled in an opinion dated April 28, 1970, that the challenged portions of the anti-bussing law were unconstitutional in violation of the equal protection clause of the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution (312 F. Supp. 503, 510). The initial opinion denied injunctive relief and granted only a declaratory judgment. However, this portion of the original opinion was withdrawn[3] and the court enjoined all of the parties in the *Swann* and *Moore* cases from "enforcing, or seeking the enforcement of" the unconstitutional portion of N.C. Gen. Stat. 115-176.1.

Although plaintiffs Swann, et al. originally sought a three-judge court, they subsequently urged upon the district court that it was empowered to act on the matter as a single judge and that a three-judge court was not required by 28 U.S.C. §2281 because of the doctrine of *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), and *Bailey* v. *Patterson*, 369 U.S. 31 (1962). The three-judge court rejected these arguments that a three-judge court was not required.[4] (312 F. Supp. 503, 507.)

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[3] The three-judge court determined to grant an injunction rather than merely a declaratory judgment after taking note of this Court's decisions in *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), and *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

[4] The court below said that it rejected "plaintiffs' attack upon our jurisdiction" (312 F. Supp. at 507). However, plaintiffs, by a brief filed in the trial court sought to make clear that their argument that a single judge might properly have disposed of the case was not a denial that the three-judge district court had *jurisdiction* over the matter, but only an argument that three judges were not required to decide the case under 28 U.S.C. §2281.

ARGUMENT

I.

The Case Presents No Substantial Questions Not Previously Decided by This Court.

A. This Court Decided in 1809 in *United States* v. *Peters* That State Legislatures Could Not Validly Annul Federal Court Judgments

It is manifest that the challenged provisions of the anti-bussing law, which forbid the consideration of race in the assignment of pupils, and forbid their being "involuntarily bussed" attempt to nullify the April 23, 1969, order of the United States District Court requiring the desegregation of the public schools in the Charlotte-Mecklenburg system. The anti-bussing law is a bald attempt to legislatively repeal the judgment of a court of the United States deciding rights of litigants under the Constitution and laws of the United States. The district court order required, *inter alia*, the implementation of plans to reassign pupils so as to eliminate racially segregated schools and the consideration of the use of transportation facilities to effect that purpose. The effect of N.C. Gen. Stat. §115-176.1 is to forbid the school board from engaging in affirmative steps to bring about racial integration of the schools and eliminate the dual system established under the compulsion of state segregation laws.

This Court unanimously rejected such an assertion of state power to set aside a federal court decree in an historic opinion by Chief Justice John Marshall delivered on February 20, 1809, and such assertions have been emphatically rejected ever since. In *United States* v. *Peters*, (US) 5 Cranch 115, 136, 3 L.Ed. 53, 59, it was stated:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

In recent years there have been a number of attempts by state officials to nullify decrees of the federal courts requiring implementation of this Court's decisions in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Brown* v. *Board of Education,* 349 U.S. 294 (1955). The most serious such attempt prompted a unanimous opinion of all the Justices of the Court in 1958 in *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958): "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

Ever since *Cooper* v. *Aaron,* the Court has disposed of similar contentions in *per curiam* decisions nullifying efforts at legislative interposition and nullification of desegregation decrees of the lower federal courts. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *stay denied,* 364 U.S. 803, *judgment affirmed, Orleans Parish School Board* v. *Bush,* 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (E.D. La. 1960; three-judge court), *stay denied, sub nom. United States* v. *Louisiana,* 364 U.S. 500 (1960), *judgment affirmed,* 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La. 1960; three-judge court), *judgment affirmed, New Orleans*

v. *Bush*, 366 U.S. 212 (1961); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Legislature of Louisana* v. *United States*, 367 U.S. 907 (1961) and *Denny* v. *Bush*, 367 U.S. 908 (1961); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Tugwell* v. *Bush*, 367 U.S. 907 (1961) and *Gremillion v. United States*, 368 U.S. 11 (1961); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961; three-judge court), *judgment affirmed*, 368 U.S. 515 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967; three-judge court), *judgment affirmed*, 389 U.S. 571 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La. 1968; three-judge court), *judgment affirmed, sub nom. Louisiana Education Commission for Needy Children* v. *Poindexter*, 393 U.S. 17 (1968); *Louisiana Education Commission for Needy Children* v. *U. S. District Court*, 390 U.S. 939 (1968) (prohibition denied); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968; three-judge court), *judgment affirmed*, 393 U.S. 222 (1968).

The decisions of the district court in this case to require the further desegregation of the schools and to require the use of bussing and other techniques were of course not final until appropriate appeals were exhausted. But rather than resorting to appeals in due course, the state officials in North Carolina engaged in discreditable attempts to review and nullify the judgments of the district court by resort to state legislative, executive and judicial actions. These assertions of power were sought to be justified by arguments that decisions of the district court need not be

obeyed and were not lawful until upheld by this Court. Such a premise must be emphatically rejected, as it was in the *Bush* case:

> From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another consequence of equal importance results. It is that the jurisdiction of the *lower* federal courts and the correctness of their decisions on constitutional questions cannot be reviewed by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative constitutional tribunal, neither the executive, nor the legislature, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed. Assuredly, this is a great power, but a necessary one. See United States v. Peters, supra, 5 Cranch 135, 136, 9 U.S. 135, 136. (*Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916, 925 (E.D. La. 1960).)

The power of the federal district court to stay state court proceedings where necessary to "protect or effectuate its judgments" against threatened relitigation in state courts is conferred by 28 U.S.C. §2283. See 1A Moore's Federal Practice, 2319-2320, 2614-2616. Such orders restraining conflicting state court proceedings have been issued in a number of school desegregation cases. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *affirmed,* 365 U.S. 569 (1961) (both the litigants and state judge were enjoined in *Bush*);

Thomason v. *Cooper,* 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962; *en banc*).

Nor does it matter that one of the state officers involved is the Governor of the State, for governors are in no different position than other state officials in terms of their duty to obey federal court judgments. *Sterling* v. *Constantin,* 287 U.S. 378, 393 (1932); *Faubus* v. *United States,* 254 F.2d 797 (8th Cir. 1958), *cert. den.* 358 U.S. 829; *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962); *United States* v. *Wallace,* 222 F. Supp. 485 (M.D. Ala. 1963); *Harvest* v. *Board of Public Instruction of Manatee County,* 312 F. Supp. 269 (M.D. Fla. 1970).

The appellants' argument that the State Board of Education, Superintendent of Public Instruction and other state officers are not properly named as defendants is plainly without merit for it was undisputed that they threatened to interfere with implementation of the desegregation order in Charlotte in reliance upon the anti-bussing law. Furthermore, these state officials share the affirmative duty to bring about desegregation of the schools with local officials. *Godwin* v. *Johnston County Board of Education,* 301 F. Supp. 339 (E.D. N.C. 1969); *Bryant* v. *State Board of Assessment,* 293 F. Supp. 1379 (E.D. N.C. 1968; three-judge court); *cf. Lee* v. *Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom. Wallace* v. *United States,* 389 U.S. 215 (1967) (a state-wide school desegregation suit).

The anti-bussing law stands on no different footing than the previous attempts to nullify the desegregation orders of federal courts revealed in the cases cited above. The efforts of state executive, legislative and judicial officers to annul the judgments of the United States District Court for the Western District of North Carolina in the Charlotte-Mecklenburg school case must be emphatically re-

pudiated. As this Court made clear in *Cooper* v. *Aaron*, 358 U.S. 1, 17-19, it has been clearly settled law since *Marbury* v. *Madison* (US) 1 Cranch 137, 177 that the "federal judiciary is supreme in the exposition of the law of the Constitution." The efforts of state officers in this case to nullify the desegregation decrees merit no serious consideration by this Court. Those actions were plainly blameworthy and discreditable, and the district court was, if anything, too mild in not issuing contempt citations or condemning the obstructions of its orders in more explicit terms. Although the cause has been set for oral argument in this Court, we suggest that the case does not merit such further consideration.

B. This Court Decided in *Green* v. *County School Board of New Kent County* That School Boards Must Take Affirmative Action to Disestablish Dual Segregated School Systems

Section 115-176.1 is an attempt to prevent North Carolina school boards from performing their constitutional duty to desegregate the public schools. Under *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968), the school boards throughout the State of North Carolina are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." It is entirely obvious, that as the court below held, school boards cannot effectively eliminate racial segregation of pupils without considering the race of pupils when planning new assignments. It is also obvious that they must use the conventional tools of school administration, including school bus systems, to convert to unitary nonsegregated systems. Section 115-176.1 attempts to severely disable North Carolina school officials in dealing with state imposed racial segregation. As the court below wrote:

> A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. (312 F. Supp. 503, 509-510.)

The decision of the district court holding that the anti-bussing law violates the equal protection clause is plainly correct for the reasons stated in the opinion below (312 F. Supp. 503, 507-510). The judgment below should be summarily affirmed.

II.

The Appeal Should Be Dismissed Because the Case Was Not Required to Be Heard by a Three-Judge Court.

A. The Case Involved Primarily a Supremacy Clause Issue and Thus no Three-Judge Court Was Required Under the Doctrine of *Swift & Co.* v. *Wickham*

It is submitted that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. § 1253 because the case is not one *required* by any Act of Congress to be heard by a three-judge district court. In *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), the Court held that 28 U.S.C. section 2281 did not require that a three-judge court be convened to decide a claim based on the Supremacy Clause of the Constitution that a state law was invalid because it conflicted with an Act of Congress. We think that there is no sound reason not to apply the *Swift* doctrine and reach the same result in a case such as this where a state law is alleged to be invalid under the Supremacy Clause because it conflicts with the judgment of a court of the United States. We believe that the same considerations relating to the efficient operation of the

lower federal courts which were held dispositive in cases where a state statute must be compared for conflict with a federal statute apply equally where the comparison must be made between the statute and the decrees of a federal court.

In the circumstances of the Charlotte case a federal district judge was faced with a series of orders by state judges purporting to rely upon a newly enacted state law to forbid that which the district judge's decisions had commanded to be done. Similarly, state executive officers, defendants in the case, threatened to defy the federal court orders in reliance upon the state law. In such a situation the power of the single federal district judge to protect his own orders should be entirely clear. There should be no need to resort to a three-judge court to put down blatant defiance of a district judge's orders by state officials.

B. The Anti-Bussing Law Is So Obviously Unconstitutional That no Three-Judge Court Was Required

In *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962), this Court held that when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." See also *Turner* v. *Memphis,* 369 U.S. 350, 353 (1962); *cf. Ex parte Poresky,* 290 U.S. 30 (1933). We believe that these principles apply in this case. For the reasons stated by the court below in its opinion the challenged portions of the anti-bussing law are plainly in conflict with this Court's decision in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968). This conflict was open and obvious. Indeed, it was plainly intended. The state legislature sought to insulate a freedom of choice basis for desegregation from federal court attack notwithstanding this Court's decision that free choice plans may be constitutionally inadequate. The legislature openly sought to prevent the school board from taking effective action

to disestablish the dual system. A three-judge court should not be required to deal with such a patent evasion of the *Brown* decision after sixteen years of such experimentation with disobedience. Efforts to obstruct *Brown* should be dealt with in the most efficient manner possible without the necessity of convening three-judge courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, or, in the alternative, that the appeal should be dismissed.

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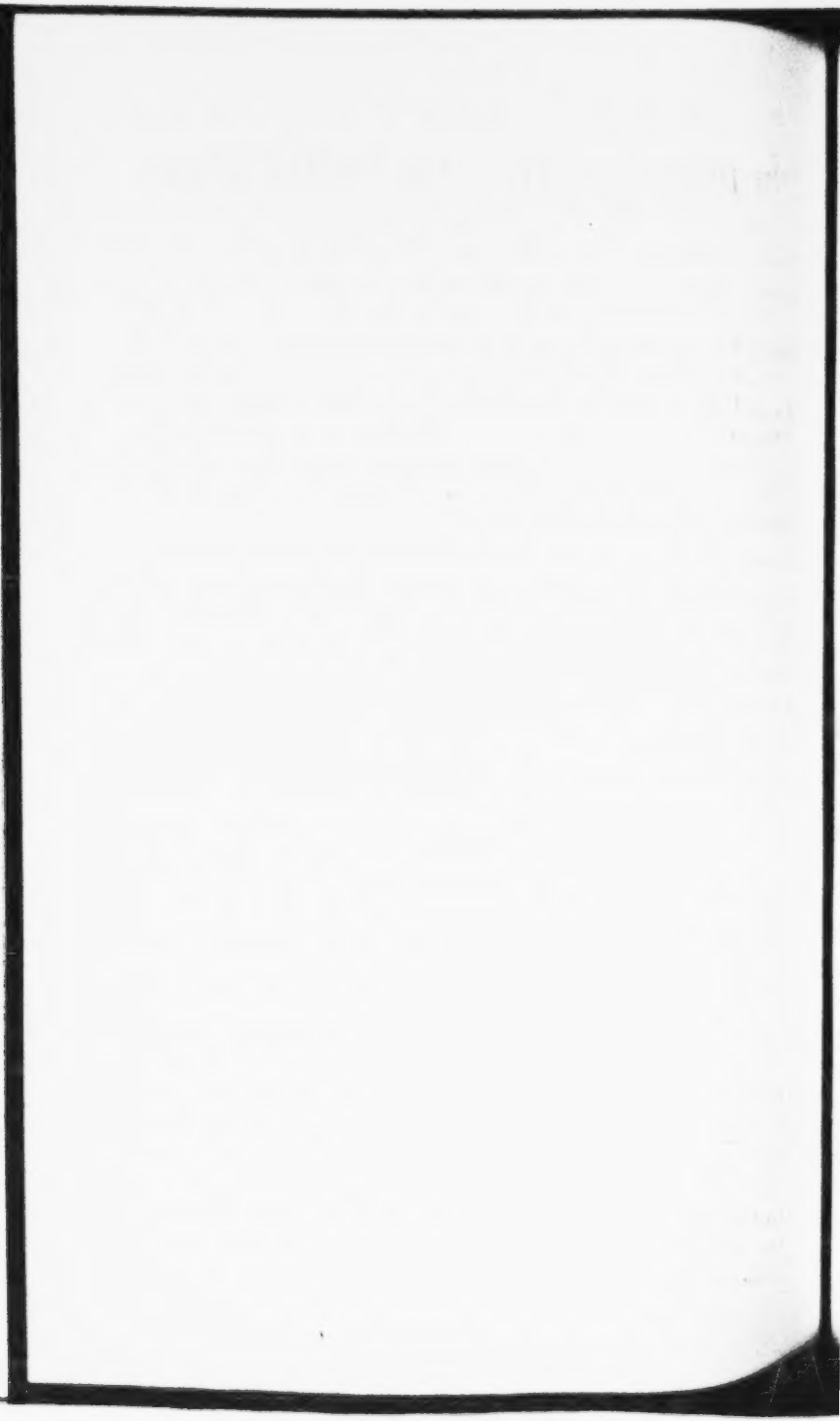

In The

Supreme Court of the United States

October Term, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction; HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Board of Education; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et al.,

Appellants,

v.

JAMES E. SWANN, et al.,

Appellees.

ON APPEAL FROM A DECISION OF A THREE-JUDGE COURT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA IN BEHALF OF THE APPELLANTS

OPINION BELOW

The Opinion of the Three-Judge Federal Court for the Western District of North Carolina is officially reported as SWANN v. NORTH CAROLINA STATE BOARD OF EDUCATION, et al., 312 F. Supp. 503 (Advance Reports No. 3, August 10, 1970). The Opinion of the Three-Judge Federal Court from which this appeal is taken also appears in the Appendix at p. 3, 4 and the final judgment entered pursuant to the Opinion of the Three-Judge Federal Court appears in the Appendix at p. 2. The Opinion of the District Court was filed on April 29, 1970.

JURISDICTION

Jurisdiction of this appeal is conferred on this Court by 28 USC 1253. Recent cases sustain the jurisdiction of this Court upon such appeals as are taken directly from three-judge district courts (UNITED STATES v. GEORGIA PUBLIC SERVICE COMMISSION, 371 U. S. 285, 9 L. ed. 2d 317, 83 S. Ct. 397; IDLEWILD BON VOYAGE LIQUOR CORP. v. EPSTEIN, 370 U. S. 713, 8 L. ed. 2d 794, 82 S. Ct. 1294; FLORIDA LIME & AVOCADO GROWERS, INC. v. JACOBSEN, 362 U. S. 73, 4 L. ed. 2d 568, 80 S. Ct. 568; ZEMEL v. RUSK, 381 U. S. 1, 14 L. ed. 2d 179, 85 S. Ct. 1271).

The Three-Judge Federal Court granted an injunction against all of the State officers, restraining them from carrying out the provisions of the statute under attack, and this would seem to bring the case in line with the decisions under which this Court will take jurisdiction to hear the appeal. The appellants do not question the legal propriety of organizing a three-judge federal court, and it is conceded that the constitutionality of the State statute was a proper case for a three-judge court, both upon the constitutional and injunctive issue. It is conceded that the Three-Judge Court was properly organized and had jurisdiction to hear the case in question.

The portion of Section 115-176.1 (1969 Supplement to Volume 3A) of the statutes of North Carolina declared to be unconstitutional consists of two sentences in said statute, which are as follows:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and public funds shall not be used for such busing."

QUESTIONS PRESENTED

I DID THE DISTRICT COURT ERR IN CONSTRUING

THE ABOVE QUOTED PROVISIONS OF THE STATUTE AS PROHIBITING RACIAL ADJUSTMENT IN THE ORGANIZATION OF A PUBLIC SCHOOL AND IN CONSTRUING THE STATUTE TO PROHIBIT ALL BUSING?

II DID THE DISTRICT COURT ERR IN HOLDING THAT THE ABOVE QUOTED PORTION OF THE NORTH CAROLINA STATUTE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

III DID THE DISTRICT COURT ERR IN HOLDING, IN SUBSTANCE, THAT THE STATE HAS NO CONTROL OVER THE EXPENDITURE OF ITS FUNDS FOR THIS PURPOSE BUT IS REQUIRED TO EXPEND ITS FUNDS ACCORDING TO THE DICTATION OF THE FEDERAL COURT?

IV DID THE DISTRICT COURT ERR IN REFUSING TO DISMISS THE ACTION AGAINST THE STATE OFFICIALS, WHO, UNDER THE LAW, ARE NOT CONCERNED WITH THE BUSING OF PUBLIC SCHOOL PUPILS WHICH IS ENTIRELY THE FUNCTION OF THE LOCAL SCHOOL UNITS?

V DID THE THREE-JUDGE DISTRICT COURT ERR IN FAILING TO DISMISS THIS ACTION AS AGAINST THE STATE DEFENDANTS?

STATUTES AND CONSTITUTIONAL PROVISIONS

The North Carolina statute (Section 115-176.1 of the General Statutes—1969 Supplement to Volume 3A) is in its entirety quoted below with that portion of the statute which was declared unconstitutional by the Three-Judge Court enclosed in parentheses, as follows:

"Sec. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.*—No person shall be

refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. (No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and public funds shall not be used for such busing.)

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

"The provisions of this article shall not apply to any application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan

voluntarily adopted by the board of education of an administrative unit."

For the purpose of showing that the State defendants have nothing to do with the management of the busing of public school pupils, we quote below certains statutes, as follows:

"Sec. 115-180.—*Authority of county and city boards of education.*—Each county board of education, and each city board of education is hereby authorized, but is not required, to acquire, own and operate school buses for the transportation of pupils enrolled in the public schools of such county or city administrative unit and of persons employed in the operation of such schools within the limitations set forth in this subchapter. Each such board may operate such buses to and from such of the schools within the county or city administrative unit, and in such number, as the board shall from time to time find practicable and appropriate for the safe, orderly and efficient transportation of such pupils and employees to such schools."

"Sec. 115-181. *Authority and duties of State Board of Education.*— (a) The State Board of Education shall have no authority over or control of the transportation of pupils and employees upon any school bus owned and operated by any county or city board of education, except as provided in this subchapter.

"(b) The State Board of Education shall be under no duty to supply transportation to any pupil or employee enrolled or employed in any school. Neither the State nor the State Board of Education shall in any manner be liable for the failure or refusal of any county or city board of education to furnish transportation by school bus or otherwise, to any pupil or employee of any school, or for any neglect or action of any county or city board of education, or any employee of any such board, in the operation or maintenance of any school bus.

"(c) The State Board of Education shall, as soon as may be practicable, allocate and assign all school buses and service vehicles now owned by the State to representative county and city boards of education in accordance with the present need of each such board for school bus transportation. Such need shall be determined by the State Board of Education from its records showing the number of State owned buses and service vehicles presently being operated by such county or city administrative unit. Upon such assignment and allocation of such school buses and service vehicles the State Board of Education shall cause the title to each such bus or service vehicle to be transferred to the county board of education, or to the city board of education to which such bus or service vehicle has been so assigned and allocated. * * * *

"(f) The State Board of Education shall allocate to the respective county and city boards of education all funds appropriated from time to time by the General Assembly for the purpose of providing transportation to the pupils enrolled in the public schools within the State. All such funds shall be allocated by the State Board of Education in accordance with the number of pupils to be transported, the length of bus routes, road conditions and all other circumstances affecting the cost of transportation for pupils by school bus to the end that funds so appropriated may be allocated on a fair and equitable basis, according to the needs of the respective county and city administrative units and so as to provide the most efficient use of such funds. Such allocations shall be made by the State Board of Education at the beginning of each fiscal year, except that the State Board may reserve for future allocations from time to time within such fiscal year as the need there of shall be found to exist, a reasonable amount not to exceed ten percent (10 percent) of the total funds available for transportation in each such fiscal year from such appropriation.

"(g) Upon such allocation by the State Board of Education, all funds so appropriated by the General Assembly shall be paid over to the respective county and city boards of education in accordance with such allocation in equal monthly installments throughout the regular school year: Provided, however, that upon the request of a county or city board of education, the State Board of Education may, in its discretion, pay over to the county or city board all or any part of any or all monthly installments prior to the time when the same would otherwise be payable. The respective county and city boards shall use such funds for the purpose of replacing, maintaining, insuring, and operating public school buses and service vehicles in accordance with the provisions of this subchapter, and for no other purpose, but in the making of expenditures for such purposes shall be subject to no control by the State Board of Education."

Provisions of the United States Constitution applicable:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUMMARY OF ARGUMENT

The appellants, State officers and agents, will argue that the Three-Judge Federal Court should have dismissed the action as to them for the reason that under North Carolina statutes and decisions of the Supreme Court of North Carolina they are not charged with the duty of initiating and controlling the transportation of public school students, and they are not charged with the duty of administering the local public schools. The local public schools, both county and city, are administered by county and city boards of education, and these boards of education control and administer local public schools. The

appellants, State officers and agents, do not select and establish bus routes, but, to the contrary, this is the duty of the principals of schools, subject to the approval of the county and city superintendents of schools. The appellants will argue that the vast majority of case laws supports this position.

The Three-Judge Federal District Court misjudged and misconstrued the North Carolina statute (G. S. 115-176.1) in that it speaks of a "unitary system" without defining the same and conjures up the old spectre that the statute could interfere with the performance of its constitutional duty to establish a unitary system. While the Three-Judge Court says that race is to be considered for the purpose of disestablishing dual systems, it plainly holds, however, that the statute is defective because it prohibits busing students to racially balance the school system. The appellants will argue that a racial balance is not required by the Constitution nor is it required by the two BROWN cases which will be cited and argued later on. The Court erroneously equates racial balancing with the desegregation of a public school system. The appellants will argue that the prohibition of racial balance, therefore, does not violate the *equal protection clause* of the Fourteenth Amendment.

The Three-Judge Federal Court erred in that the effect of its decision is to require the State to furnish funds for the purpose of busing to achieve racial balance other than those appropriated by the General Assembly and thus in effect has created suit against the State and deprived the State of the authority to handle its own public tax funds.

The appellants, State officers and agents, will argue that the Opinion of the Three-Judge Court deals in general and abstract statements and makes no definition of a "unitary school system" and makes no definition of "racial balance", and, therefore, leaves the local units, as well as the appellants, in a state of confusion as to what they should do.

STATEMENT

The public schools of the State of North Carolina are ad-

ministered by county and city boards of education. In some counties one board of education administers the whole system, both out in the county and in the cities and towns in the county. The Charlotte-Mecklenburg Board of Education administers and operates the public schools both in Mecklenburg County and in the City of Charlotte, the two school systems having been merged under an act of the General Assembly.

The present appellants were not parties-defendant when this litigation was originally instituted during the school year of 1964-1965, but the procedures for desegregation adopted by the Charlotte-Mecklenburg Board of Education for the school year 1964-1965, were approved by the District Judge when the case was appealed to the United States Court of Appeals for the Fourth Circuit. The appeal was heard during the school year of 1965-1966, and the Circuit Court of Appeals approved the order entered by the District Judge (SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, CCA-4, 369 F. 2d 29). On July 22, 1969, the District Judge signed an order allowing appellees to file a supplemental complaint and add the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction for the State of North Carolina, as defendants in the action (see Appendix p. 34). The appellees filed supplemental complaint and asked for a temporary restraining order (see Appendix p. 23). Thereafter, on February 25, 1970, the District Judge signed an order adding other parties-defendant, namely: Robert W. Scott, Governor of North Carolina, A. C. Davis, Controller of the State Board of Education, Representative James Carson, Attorney William H. Booe, and certain other individuals composing the Concerned Parents Association. The plaintiffs again renewed their request for an injunction of a mandatory nature against the defendants and the additional defendants (see Appendix p. 52). On February 19, 1970, the District Judge requested the designation of a three-judge court to pass on the constitutionality of the North Carolina statute heretofore quoted in full (see Appendix p. 19). On February

23, 1970, the Chief Judge of the Fourth Circuit organized the Three-Judge Court as shown on Appendix p. 17, and on April 29, 1970, the Three-Judge Federal Court issued its opinion which appears in Appendix, beginning at p. 3, 4.

The Court will see, therefore, that this litigation had been pending for some time and considerable legal action had been taken before the State appellants had ever been brought into the suit, the first Order adding any of the State appellants having been entered July 22, 1969, and the second Order on February 25, 1970. The appellants, State officers and agents, appealed from the Opinion and Final Judgment of the Three-Judge Federal Court to this Court.

ARGUMENT

The Action Should Have Been Dismissed As To These Appellants.

The Attorney General represents the North Carolina State Board of Education, the State Superintendent of Public Instruction of North Carolina, the Governor of North Carolina, the Controller of the State Board of Education, William K. McLean, Judge of the Superior Court of North Carolina, which is a court of general jurisdiction, and Representative James Carson, who is a member of the General Assembly of this State. The Opinion of the Three-Judge Federal Court is officially reported as SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., WDNC, 312 F. Supp. 503 (No. 3 of Advance Reports, August 10, 1970).

We deal first with the question of whether the Three-Judge District Court erred in refusing to dismiss this action as to these appellants. As to the appellant, A. C. Davis, Controller of the State Board of Education, the appellees cannot produce a single decision of any court or any statute that would make him liable in this case. He is not a policy making official and deals with the financial transactions of the whole Board as to its records and balances, and he has no authority whatever with respect to school buses. As to him the action should be dis-

missed. Governor Robert W. Scott is not charged by the Constitution or the laws of the State with any duties as to the operation of school buses or the control and operation of local school units, and he does not make appropriations of funds nor allocations of funds. He is Ex Officio Director of the Budget and can stop expenditures if he is of the opinion that money is being illegally spent. William K. McLean is a Judge of the Superior Court of this State, which is a court of general jurisdiction, and he issued a restraining order enjoining the Superintendent of the Charlotte-Mecklenburg Board of Education from implementing the Order of the District Court in that he enjoined the Board from spending any funds to purchase and operate school buses. The District Court's injunction as to him could be sustained as a protection of jurisdiction only, but, otherwise, Judge William K. McLean has nothing to do with the operation of schools and the busing of pupils.

We come now to the question of whether or not this action should be dismissed as to the North Carolina State Board of Education and Dr. A. Craig Phillips, State Superintendent of Public Instruction. The question of whether the State appellants, State Board of Education and Dr. A. Craig Phillips, State Superintendent of Public Instruction, have any right to control and administer the public school system has been passed upon by the lower federal courts several times, including the United States Court of Appeals for the Fourth Circuit. An examination of the public school statutes (Chapter 115 of the General Statutes of North Carolina) will show that the local boards of education, that is, the city and county boards of education, administer and operate the public schools and that these State appellants cannot interfere with the duties of the local boards nor with their superintendents. This matter has been passed upon by the Supreme Court of North Carolina and it is held that the administrative power is lodged in the local units (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163; DILDAY v. BOARD OF EDUCATION, 267 N. C. 438, 148 S. E. 2d 513; IN RE HAYS, 261 N. C. 616,

135 S. E. 2d 645). We ask the Court to give effect to these decisions under the Federal Rules of Decision Statute. The Federal Courts have ruled to the same effect (BLUE v. DURHAM PUBLIC SCHOOL DISTRICT, 95 F. Supp. 441; JEFFERS v. WHITLEY, 165 F. Supp. 951; McKISSICK v. DURHAM CITY BOARD OF EDUCATION, 176 F. Supp. 3). In COVINGTON v. EDWARDS, CCA-4, 264 F. 2d 780, the Fourth Circuit ruled that the District Judge was correct in rejecting the Motion of the plaintiffs to amend the Bill of Complaint by joining the State Board of Education and the Superintendent of Public Instruction of the State as parties-defendant. The case involved the assignment of pupils. In McINNISH v. BOARD OF EDUCATION, 187 N. C. 494, the Supreme Court of North Carolina said:

> "The county board of education is given the power and authority to direct and supervise the school system for the benefit of all the children in the county, and in the exercise of its functions to perform certain assigned duties."

When it comes to school buses and the transportation of pupils, we find that under Section 115-186 of the General Statutes of North Carolina, the following:

> "The principal of the school to which a school bus has been assigned shall, prior to the commencement of each regular school year, prepare and submit to the superintendent of schools of a county or city administrative unit a plan for a definite route, including stops for receiving and discharging pupils, for each school bus assigned to such school so as to assure the most efficient use of such bus and the safety and convenience of the pupils assigned thereto."

In addition to the statutes already quoted, we find that under Section 115-186 (e) of the General Statutes of North Carolina, the following:

> "No provision of this subchapter shall be construed to place upon the State, or upon any county or city, any

duty to supply any funds for the transportation of pupils, or any duty to supply funds for the transportation of pupils who live within the corporate limits of the city or town in which is located the public school in which such pupil is enrolled or to which such pupil is assigned, even though transportation to or from such school is furnished to pupils who live outside the limits of such city or town."

A Three-Judge Court in the Case of SPARROW v. GILL, 304 F. Supp. 86 (1969), has held as follows:

"The State may allocate its funds on any basis it chooses —or may cut off funds entirely—so long as it does not capriciously favor one group of citizens over another. * * * No one has a constitutional right to ride a school bus. His is merely the right not to be excluded from a benefit which is conferred by the State upon fellow citizens whose claim to it is not more 'reasonable' than his. * * * We have held the city-county distinction a constitutionally valid one. Whether it would be better and fairer to abolish it and go to a measured-distance-from-school basis, as urged by plaintiff, is a political question for the people and their legislative representatives. It is not for us to answer, and we would exceed our jurisdiction were we to attempt it."

In this case the Three-Judge Federal Court held that it was a constitutional classification to furnish buses for the transportation of pupils who live out in the county and not to furnish buses for pupils who lived inside incorporated cities. The status of the State Board of Education in the field of the transportation of public school pupils has been passed upon by the Supreme Court of North Carolina. In the case of HUFF v. BOARD OF EDUCATION, 259 N. C. 75, 130 S. E. 2d 26 (1963), the then Chief Justice of the Supreme Court of North Carolnia, writing for the Court, said:

"The General Assembly of North Carolina relieved the State Board of Education from all responsibility in connection with the operation and control of school buses in this State by the enactment of Chapter 1372 of the North

> Carolina Session Laws of 1955, which Act authorizes county and city boards of education to operate buses for the transportation of pupils enrolled in the public schools of such county or city administrative unit. The Chapter is now codified as G. S. 115-180, et seq."

The doctrine set forth, as above quoted in the HUFF case, was affirmed and quoted in the case of BROWN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 267 N. C. 740, 743, 149 S. E. 2d 10 (1966).

The Interpretation of the Statute by the Three-Judge Federal Court.

Putting to one side, for the time being, the constitutionality of the statute, we believe the Court has put the wrong interpretation on its provisions. For the convenience of the Court we quote two sentences which the Three-Judge Federal Court found to be constitutionally defective, as follows:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and public funds shall not be used for any such busing."

The Court says that the Constitution is not color-blind with respect to the affirmative duty to operate a unitary school system. It further says it would make the constitutional principle of BROWN I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race, says the Court, would, as a practical matter, prevent school boards from altering existing systems. The Court says that the statute prohibits the busing of students "in order to racially 'balance' the school system", and the Court also speaks of the "affirmative duty to establish and operate a unitary school system." We do not have any definition of the words "unitary school system" nor do we have any definition of the word "balance" as related to a racial school system. The only de-

finition we have of the words "unitary school system" is one referred to in the Opinion concurring in the result in the case of NORTHCROSS v. SCHOOL BOARD OF MEMPHIS, ___ U. S. ___, 25 L. ed. 2d 246, 90 S. Ct. ___, where it is said, quoting from ALEXANDER v. HOLMES COUNTY BOARD OF EDUCATION, 396 U. S. 19, 24 L. ed. 2d 19, 90 S. Ct. 29, that a unitary system was one "within which no person is to be effectively excluded from any school because of race or color." The statute here under consideration does not in any manner exclude pupils from public schools because of race. The statute prohibits any form of gerrymandering of school districts. It does not prohibit transferring of pupils from one school to another because of race but it does prohibit a predetermined racial balance which is usually construed to mean a proportional representation. The word "balance" cannot be construed, as a practical manner, in a black and white situation to mean that there shall be an equal number of black students and white students in any particular school facility. The reason for this is the simple fact that black students are a minority group being in many instances only 20, 25 or 30 percent of the total number of school pupils. There would not be enough black pupils to go around on this theory. We take it the Court means by the word "balance" that there shall be a proportional representation determined by the total number of students and by ascertaining the number of white students and the number of black students in order to compute the represental fraction.

We do not read BROWN I AND II to hold that there must be compulsory busing of students. No such language appears in the Opinions in these cases, and the BROWN cases do not speak of a unitary school system. The BROWN case does say:

> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts and attendance areas into compact units to achieve a system of determining admis-*

sion to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Emphasis ours)

It will thus be seen that the Court in the BROWN cases had in mind "school districts and attendance areas" rather than any unitary system or a racial balance. A unitary system and racial balance are words invented by the agency of Health, Education and Welfare, which agency also advocates proportional representation.

Although the Congress has prohibited the busing of students to achieve a racial balance (42 USCA 2000c(b); 42 USCA 2000c-6(a)(2), the Court disposes of the directions of the Congress in a very easy manner, saying: "The statute 'cannot be interpreted to frustrate the constitutional prohibition (against segregated schools).'"

If it is said that the trend of the North Carolina statute is towards the creation of reasonable zones or attendance areas for public school facilities, then we see nothing wrong in the creation of such a system. Those residing in the attendance areas would attend the schools, regardless of race, and they would ride buses regardless of race to reach the school facilities within the attendance area. The statute really provides the only reasonable and sensible way to solve this question. There is no way, considering the relation of the number of blacks to the number of whites, to establish schools "in which there are no white schools and no Negro schools but just schools." The establishment of reasonable attendance areas and the preservation of the so-called "neighborhood school" permits the transportation of pupils on a nonracial basis, which is the way a pupil should be transported for if a pupil should not be excluded from school on account of race he should not be compulsory bused to a school and compulsory enrolled in a school on account of race. The racial prohibition should work both ways.

The Constitutionality of the Statute

The Three-Judge Court erroneously interprets the statute to

be a flat prohibition against assignment by race which would prevent school boards from altering existing dual systems. The Three-Judge Federal Court erroneously interprets the prohibition against racial balance as forever prohibiting the desegregation of a school and to support its statement says: "A school board, in taking affirmative steps to desegregate its system, must always be engaged in some degree of balancing." The Court then says that these statutory prohibitions are unconstitutional as violative of equal protection. The District Court states in substance that it does not follow that busing will be an appropriate remedy in any particular school segregation case. The District Court says: "We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems." What the Court leaves out is that the busing prohibited is that which is utilized "for the purpose of creating a balance or ratio of race, religion or national origins."

This is entirely an erroneous view of the statute. The statute does not prevent the busing of black children to white schools and white children to black schools. It does not prevent the closing of black schools and the transfer of black students to school facilities where the predominant enrollment is that of white children. It does not prevent the closing of black schools, the enlargement of the attendance areas and the busing of black children to the facilities in the attendance area. It does not prevent the busing of high school pupils to the large high schools in a county or city. It does not prevent the pairing of grades. It was not designed to prohibit any of these normal readjustments that transport children to schools regardless of race. What the real motive of the statute is is that an elementary child shall not be treated as a mere material unit or similar to a pawn on a chess board and be moved and transported to fulfill racial proportions and ratios. It was intended to prohibit the transportation of an elementary child past several eligible schools nearest its home and on to some far-

away school for several miles in the other end of town or in the other end of the county. Such children would have to get up early to leave on the bus and would come home late and have little or no time for their homework. If it is said that this involves the concept of neighborhood schools, then the answer is that to some extent it does do that. Why should some children go to school close to their home and other children who live close be transported for miles to another school? This is the unconstitutional use of race and if race cannot be used for exclusion of pupils, why should it be used for the transportation of pupils to faraway schools? We submit that the Three-Judge Federal Court has utterly missed the motive and the point of the statute, and if it is said that there is a violation of the equal protection of the law, then the violation takes place at the point where one child in similar circumstances, as related to another child, is transported far beyond schools close to its home to satisfy the sociological concept of mathematical ratios.

The Congress of the United States, which represents the entire Nation, evidently thought that there should not be busing for the purposes of creating a racial balance or creating a racial imbalance. In the Civil Rights Act of 1964, and found in 42 USCA 2000c(b), we find the Congressional definition of desegregation, as follows:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, *but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.*" (Emphasis ours)

If it shall be said that the above quoted definition applies to the granting of funds by federal agencies to the public schools, then this does not destroy the fact that it is a Congressional definition of desegregation. However, the Congress went further —in 42 USCA 2000c-6(2) there is a proviso that is binding on all federal courts, which is as follows:

"Provided, that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

Apparently the Three-Judge District Court recognized if the last above quoted provision of the federal statute is constitutional and valid, then the State statute here under attack would also be constitutional and valid. The Three-Judge Federal Court lumps this together with the principle of neighborhood schools and disposes of it in one sentence which declares unconstitutional the last above quoted Act of Congress. The Three-Judge Federal Court said: "We may dispose of the first contention at once. The statute 'cannot be interpreted to frustrate the constitutional prohibition (against segregated schools.' "

The Civil Rights Act of 1964 is applicable to and binding upon all school boards in the Nation. Congress had the right to impose these definitions and standards, both under the Interstate Commerce Provision and under the Implementing Section of the Fourteenth Amendment.

Senator Humphrey, who cannot be accused of any racial bias, when this matter was being debated on the floor of the Senate, held an opinion quite contrary to the Opinion of the Three-Judge Federal Court in this case. In 110 Congressional Record, 12717, we find the following:

"Mr. Humphrey: * * * I should like to make one further reference to the GARY case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration * * *. The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools * * *. The fact that

there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language in Section 4."

It is quite evident that the busing of children to achieve the racial balance was not contemplated in BROWN I and II (347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873; 349 U. S. 294, 99 L. ed. 1083, 75 S. Ct. 753), and such phraseology is not mentioned in either of the Opinions. When this Court ordered further argument in BROWN II it evidently contemplated and was thinking about attendance areas or geographical school districts. For example: One of the questions to be considered, as decided by this Court, is as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) Would a decree necessarily follow providing that, within the limits set by normal geographical school districting, Negro children should forthwith be admitted to schools of their choice, or * * *."

Again, as we have heretofore noted, in the Opinion in BROWN II, The Court related the problems to be considered, and one of these was: "Revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis * * *."

It is quite evident that this Court had in mind the common sense establishment of districts or attendance areas to bring about desegregation, and while this Court did mention the school transportation system and rearrangement of personnel, it never once intimated that there should be a compulsory racial balance.

We do not attack any of the principles stated in BROWN I and II; in fact we rely on these cases. The BROWN cases do not by an occult, supernatural and metaphysical legal process convert protected rights into compulsory duties and obligations. During World War II the Japanese-Americans were

forcibly removed from the West Coast under the War Powers for the safety of the Nation. Young men must obey the Draft Act for military service. We must pay taxes and obey the traffic laws. These are not rights but obligations carried into effect by force. A black man can ride in any railroad car open to passengers but he cannot be forced to go into another car because there are too few black people in the car in proportion to the white people. A black man can ride in the rear, middle or front of a passenger bus but if he chooses to ride in the rear, then the bus driver cannot lawfully make him move to the front of the bus because there are too few black people in the front in relation to the white people. Yet when it comes to public schools a protected right is suddenly converted into a forcible obligation under the guise of enforcing a right. The black people who work, earn their living and send their children to the public schools are not asking for the compulsory busing of their children to maintain a racial balance any more than the white people. The mothers of black children in the elementary grades do not want their children to ride for two and one-half hours (the average in Charlotte-Mecklenburg) plus, in some instances, a change of buses at one school and a thirty-five (35) minute ride to the school of destination. They want to be close enough to see their children if they suddenly become ill or something happens. The children will leave home at an early hour and come home late with no time for homework. As a black man said in a meeting in North Carolina: "We just want to be treated like anybody else."

The case of BRIGGS v. ELLIOTT, EDSC, 132 F. Supp. 776, referred to in the debilitating words of the legal agents of the sociologists as "The Briggs Dictum", expresses the very point in this case. BRIGGS was decided by eminent judges, and the Court said:

> "Whatever may have been the views of this court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.
>
> "Having said this, it is important that we point out what

the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over and regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the State or state agencies, not a limitation upon the freedom of individuals."

We have quoted from this case because we believe it is a sound interpretation of the BROWN cases. If this is not true, then the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits are wrong (SPRINGFIELD SCHOOL COMMITTEE v. BARKSDALE, CCA-1, 348 F. 2d 261; BRADLEY v. SCHOOL BOARD OF RICHMOND, VIRGINIA, CCA-4, 345 F. 2d 310; SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, CCA-4, 369 F. 2d 29; DEAL v. CINCINNATI BOARD OF EDUCATION, CCA-6, 369 F. 2d 55; BELL v. SCHOOL CITY OF GARY, INDIANA, CCA-7, 324 F. 2d 209; Cert. Den. 377 U. S. 924, 84 S. Ct. 1223, 12 L.

ed. 2d 216; CLARK v. BOARD OF EDUCATION OF LITTLE ROCK, CCA-8, 369 F. 2d 661; DOWNS v. BOARD OF EDUCATION OF KANSAS CITY, CCA-10, 336 F. 2d 988, Cert. Den. 380 U. S. 914, 85 S. Ct. 898, 13 L. ed. 2d 800).

A nation such as ours which is constituted by a blend or amalgam of races, minority groups, and many faiths and religions simply cannot afford to have quotas or proportional representation in governmental activities. Is it discrimination to admit a person because he is a Negro, Pole, Catholic, or Anglo-Saxon? If so, then such person can be excluded for the same reason. This would be contrary to the Fourteenth Amendment. As has been said, in substance, this is more than the question of racial imbalance, and it involves a prohibition by law if school boards admit or exclude groups or children on account of race, religion or national origin. It is an impossible task for a school board to try to assemble the ideal blend by admitting the right quotas or other proportions of religious or ethnic groups. The situation is analogous to the case of HUGHES v. SUPERIOR COURT, 339 U. S. 460, 464, 70 S. Ct. 718, 721, 94 L. ed. 985, that if a state could be prohibited from banning picketing to hire more Negroes "would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." If the differences are destroyed, then integration is established. If any group is to be promoted in competition with other groups, then discrimination is established.

We have not favored quotas and proportional representation in other fields. This Court has condemned proportional representation of races in organizing juries (CASSELL v. TEXAS, 339 U. S. 282, 94 L. ed. 839, 70 S. Ct. 629; AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, 65 S. Ct. 1276). In TRUAX v.

RAICH, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, this Court condemned a proportional employment of aliens in Arizona, saying: "If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the law would be a barren form of words."

In COLON v. TOMPKINS SQUARE NEIGHBORS, INC., SDNY, 294 F. Supp. 134, 139, the Court said that the so-called "balanced tenant body" was constitutionally unsound. In BANKS v. HOUSING AUTHORITY, 260 P. 2d 668, the Court observed that the individual was entitled to equal protection of the law and not groups or a body of persons according in to their number. We have favored sharp revision of our National Immigration Laws so as to eliminate the consideration of racial quotas in determining those who shall be admitted to the United States (79 Stat. 911, 8 USCA 1151, 1965 U. S. Code and Admin. New, pp. 3328-3354). We have passed through the experience of colleges setting quotas for persons of different races and faiths (notably the quota of Jews in medical schools). The greatest damage of busing children to achieve racial balance (or to redress racial imbalance) is the disruption of the school system. Teachers are leaving the teaching field. Superintendents and teachers, where available, are taking early retirement or else resigning and going into other fields of employment. School bond issues have been defeated (Raleigh defeated a twenty-seven million dollar ($27,000,000) bond issue because of planned busing of children), and a diminishing of school finances. Teachers have been forced to teach subjects not in their field of competency. The forced racial balance of faculty has resulted in connection between a school-wide composition of faculty and the black-white ratio for language teachers, science teachers, and mathematics teachers. Good relationships of an educational nature have been broken and the normal course of curricula has been disregarded. There is inherent in the quota system a constant need for recalculation or readjustment which results in the transfer of pupils and teachers during or in the middle of a term. In the Charlotte-

Mecklenburg case it is suggested that a computer be used in order to keep an inflexible and constant quota. This is but a sacrifice of sound education to the whims of social planners and impractical sociologists. The human personality cannot be treated as if a person could be reduced to a material substance and a movable, inanimate body like a billiard ball. Another result is discussed by Professor Bickel in *The New Republic* of February 7, 1970, pp. 20, 21. He says, in substance, that the net result is that integration reaches a tipping point and resegregation results. The whites flee to other school districts or go to private or parochial schools. The blacks simply change places with the whites. The vice of the quota system is that it assumes that blacks should be treated like anybody else but to the contrary blacks should be treated differently because they are different from other citizens.

If it shall be said that our position favors the neighborhood school system or nondiscriminatory zoning or reasonable attendance areas, then we see nothing wrong with such a plan. It has not yet been said that such a plan, fairly administered, is invalid. In KEMP v. BEASLEY, CCA-8, 423 F. 2d 851, the Court said:

> "1. We do not rule that the neighborhood school concept is constitutionally permissible or is constitutionally impermissible.
>
> "We do not rule that busing is a constitutional imperative. Busing is only one possible tool in the implementation of unitary schools. * * *
>
> "3. We do not rule that precise racial percentages across the district at the respective elementary, junior high, and high school levels are as yet constitutionally required. * * * We do not read Alexander as demanding strict percentages. * * *
>
> "5. We do not as yet rule that freedom of choice is not a permissible tool for achieving a unitized system. * * *"

While the Fifth Circuit has for the most part insisted on a

precise quota it is relevant that it has not always enforced such rule. In the case of ELLIS v. BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, (Decided February 17, 1970; No. 29124) the neighborhood school system was upheld. The Courts in other Circuits have supported the neighborhood school system (See: BELL v. SCHOOL CITY OF GARY, INDIANA, CCA-7, 324 F. 2d 209, cert. den 377 U. S. 924; DEAL v. CINCINNATI BOARD OF EDUCATION, CCA-6, 369 F. 2d 55, cert. den. 389 U. S. 847; BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA v. BRAXTON, CCA-5, 402 F. 2d 900; DOWNS v. BOARD OF EDUCATION OF KANSAS CITY, CCA-10, 386 F. 2d 988, cert. den. 380 U. S. 914; BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS v. DOWELL, CCA-10, 375 F. 2d 158, cert. den. 387 U. S. 931; GRAVE v. BOARD OF EDUCATION OF NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, 299 F. Supp. 843).

There are other cases that could be cited but these cases are enough to show that quotas are not the ruling plan by any means. In the case of UNITED STATES v. JEFFERSON COUNTY BOARD OF EDUCATION, CCA-5, 380 F. 2d 385, Circuit Judge Coleman concurred on the basis that the majority did not nullify freedom of choice and that it did not require percentages. He said:

> "The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.
>
> "Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention."

The decision of the Three-Judge Federal Court, in this case, would deprive the State of its authority in expending its own funds. The State allocation statute is not attacked but under the decision the State would have to divert funds from other local school units to carry out orders issued in larger units with greater pupil enrollment. There are about 180 school units in the State and they must be considered also. The Federal Courts have not held, so far, that they can issue decrees that compel the legislatures of the states to make appropriations as they demand. In this sense the case against the State Appellants amounts to a suit against the State, and this is contrary to the provisions of the Constitution of the United States. Our constitutional history does not furnish any precedent for such action. If this can be done, then all state powers have been nullified.

CONCLUSION

In its decision in this and the other public school cases now before the Court this Court will determine the fate and destiny of the public school system of the Nation. The professional black organizations with their salaried staffs have a vested interest in forcible integration. The black people who send their children to public school, for the most part, are on our side. They do not want their children to spend long hours riding buses and located in schools far away from their care if something happens to their children. Why should this Court reverse its position on quotas at the wish of the professional black organizations? The result will be the educational and financial deterioration and erosion of the public school system. No one disputes the legal principle that black people must be treated as anyone else and that discrimination is at all times prohibited. This refers to state action and is negative in nature, but it is wrong as a matter of law to convert this into a positive kind of obligation rather than the protection of a right. Such a holding would be contrary to a rational construction of the Fourteenth Amendment. The rule asked for by the Appellees cannot in the long run be enforced because it is contrary to the wishes of the

people. It will promote vast numbers of private schools. Just as the people did not approve the prohibition of intoxicating liquors, so, in this case, they will not approve the iron hand and arbitrary, determinative system of enrolling their children in the public schools.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ralph Moody, Deputy Attorney General of North Carolina, do hereby certify that I served copy of the attached Brief by mailing copies of same from the Post Office in Raleigh, North Carolina, with first class postage prepaid, to each of the attorneys named below:

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I certify that said Briefs were mailed on 10th day of September, 1970.

Ralph Moody
Deputy Attorney General

FILE COPY

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLE

In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction; HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Board of Education; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et al.,

Appellants,

v.

JAMES E. SWANN, et al.,

Appellees.

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NO. 498

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil No. 1974

JAMES E. SWANN, et al, — Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, — Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, — Additional Parties Defendant.

CIVIL NO. 2631

MRS. ROBERT LEE MOORE, et al, Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiff's motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. Braxton Craven
United States Circuit Judge

John D. Butzner, Jr.
United States Circuit Judge

James B. McMillan
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil No. 1974

JAMES E. SWANN, et al., — Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, — Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, — Additional Parties Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al., Plaintiffs,

versus

CHARLOTTEE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr. Andrew A. Vanore, Jr., Assistant Attorney General, for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to de-

segregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education,* in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the con-

---

1. On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

2. There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

stitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools,* was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such

attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g.*, *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23,

1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing

more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegrate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a) (2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United*

---

3. § 2000c:

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

States v. School Dist. 151 of Cook Co., 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U. S. 350 (1962); *Bailey v. Patterson*, 369 U. S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U. S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U. S. 430 (1968), the Supreme Court declared that a school board

must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the cirumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U. S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, ... U. S. ....., 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U. S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[4]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly

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4. The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, or national origins from the community.

Northcross v. Bd. of Ed. of the Memphis City Schools, ... U. S. ....., 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 Harv. L. Rev. 564 (1965).

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka,* 347 U. S. 483 (1954) *(Brown I).*

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to

> attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U. S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U. S. 294 (1955) (*Brown II*), and *Brown v. Bd. of Ed of Topeka*, 347 U. S. 483 (1954) (*Brown I*), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v.*

School Bd. of New Kent Co., 391 U. S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, ... U. S. ....., 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment —contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U. S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any

reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V.

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al, Plaintiffs,

v

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties Defendant

DESIGNATION OF THREE-JUDGE COURT

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above-entitled has been instituted in the United States District Court for the Western District of North Carolina, and that a motion and application for restraining order and other relief have been filed in this action which do or may raise the question of the constitutionality of Section 115-176.1 of the General Statutes of North Carolina, commonly spoken of as the "anti-bussing" statute and which application and motion also raise other questions; and that application for relief as set out in the pending motion and order was made to James B. McMillan, United States District Judge for the Western District of North Carolina, who has notified the undersigned, pursuant to Section 2284 of Title 28, United States Code, of the pendency of such application to the end that a court of three judges may be constituted in accordance with Section 2281, Title 28, United States Code.

Now, therefore, I do hereby designate Honorable J. Braxton Craven, Jr., United States Circuit Judge, Fourth Judicial Circuit, and Honorable John D. Butzner, Jr., United States Circuit Judge, Fourth Judicial Circuit, to serve with the Honorable James B. McMillan in the hearing and determination of the above-entitled action, as provided by law, the three to constitute a district court of three judges as provided by Section 2284, Title 28, United States Code.

This the 23rd day of February, 1970.

Clement F. Haynsworth, Jr.
Chief Judge - Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al, Plaintiffs,

v

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties Defendant

NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE-JUDGE COURT

Several orders, starting April 23, 1969, have been entered by this court dealing with pending motions for desegregation of the Charlotte-Mecklenburg schools. The orders of December 1 and December 2, 1969, and February 5, 1970, are attached as Exhibits A, B and C to this motion.

The December 2, 1969, order appointed Dr. John A. Finger, Jr. to assist the court in the preparation of a plan for the desegregation of the schools. The February 5, 1970, order directs the schools to be desegregated according to various principles described or referred to in the order, including the requirement erroneously advertised as "involuntary bussing to achieve racial balance" which reads as follows:

> "That transportation be offered on a uniform nonracail basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance."

A suit has been filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, No. 70-CVS-1097, entitled "TOM B. HARRIS, G. DON ROBERSON, et al, Plaintiffs, vs. WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools, and CHARLOTTE BOARD OF EDUCATION, Defendants," and pursuant to allegations made in that action, Judge W. K. McLean, of the Superior Court of North Carolina, has entered an order temporarily restraining the School Board and the Superintendent from paying Dr. Finger's bills until they have been approved by the Board of Education, and ordering that "the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the

Charlotte-Mecklenburg School System from one school to another and from one district to another district."

The complaint, the amended complaint and the two orders of Judge McLean dated February 12, 1970, are attached hereto as Exhibit D.

The Governor of North Carolina has made a public statement, Exhibit E, and has written a letter to the Department of Administration, Exhibit F.

The State Superintendent of Public Instruction, a party to this case, has made a public statement, Exhibit G.

Reports received from the School Board on February 12, 1970, and February 19, 1970, fail to mention Judge McLean's order, and fail to indicate that the Board have appealed or intend to appeal Judge McLean's order; and these reports also reveal no action by the Board or school staff addressed to the transportation problem. It appears that whether the action of Judge McLean and the other state officials do or do not directly conflict with this court's orders, the practical effect of those actions is or may be to delay or defeat compliance with the orders of this United States Court.

The plaintiffs have filed a motion to make additional parties, and have requested this court to enter orders dissolving Judge McLean's restraining orders and directing the Governor, the State Department of Instruction and the "Concerned Parents Association" and their attorneys and others not to interfere further with the compliance of the school Board with the orders of this court.

Some of the issues raised by this situation may involve the constitutionality of a state statute and others may be matters cognizable by a single judge.

It appearing to the court that pursuant to Title 28, U.S.C.A., this matter should be heard and determined by a district court of three judges.

NOW, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 19th day of February, 1970.

James B. McMillan
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al, Plaintiffs v CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, Defendants	)	CIVIL ACTION NO. 1974

SUPPLEMENTAL COMPLAINT

I.

This Supplemental Complaint is a proceeding for a temporary restraining order and a preliminary and permanent injunction against the enforcement of the portions of North Carolina General Statutes §115-176.1, (Chapter 1274 of the Session Laws of the 1969 General Assembly of North Carolina, ratified on July 2, 1969, a copy of which is attached hereto as Exhibit A) which reads:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race,

religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

In addition, plaintiffs seek a declaratory judgment that the statutory provisions complained of are unconstitutional on their face and as applied.

II.

A. Jurisdiction of this Court is invoked under 28 USC § 1343, this being a suit in equity authorized by 42 USC § 1983 to redress the deprivation, under color of North Carolina Law, of rights, privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

B. Jurisdiction is further invoked under 28 USC § § 2281 and 2284, this being a suit for a temporary restraining order, an interlocutory and permanent injunction restraining the enforcement, operation and execution of portions of North Carolina General Statutes § 115-176.1 and requiring the convening of a three-judge Federal Court. Jurisdiction is further invoked under 28 USC § § 2201 and 2202, this being a suit for a declaratory judgment declaring the unconstitutionality of portions of North Carolina General Statutes 115-176.1.

III.

A. The plaintiffs bringing this Supplemental Complaint are those plaintiffs who originally brought this action styled James E. Swann, et al., v. Charlotte-Mecklenburg Board of Education, Civil Action No. 1974, which was filed on January 12, 1965.

B. This Supplemental Complaint, as the original complaint, is brought on behalf of the individual plaintiffs and other black students and parents similarly situated, pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of such other black students, who are and have been limited, classi-

fied, segregated or otherwise discriminated against in ways which deprive or tend to deprive them of equal educational opportunities because of race or color. The members of the class are so numerous as to make it impractical to bring them all before the Court. A common relief is sought and plaintiffs adequately represent the interests of the class.

IV.

The defendants in this action are:

(a) The Charlotte-Mecklenburg Board of Education, the original defendant in this case, and the individual members thereof heretofore added as defendants by order of the Court dated June 4, 1969;

(b) The North Carolina State Board of Education, a public body corporate of the State of North Carolina, which is charged by the State Constitution and laws with the duty and responsibility of the general supervision and administration of the public schools and educational funds of the State of North Carolina; and

(c) Dr. A. Craig Phillips, who is the elected State Superintendent of Public Instruction of the State of North Carolina, the administrative head of the Public School System of the State and by force of law, a member and the Secretary of the State Board of Education.

V.

Plaintiffs initially commenced this action on January 12, 1965, (Civil Action No. 1974) against the Charlotte-Mecklenburg Board of Education seeking to obtain the elimination of racial segregation in the public schools in Mecklenburg County.

VI.

On July 14, 1969, the Court entered an Order approving a plan submitted by the Board for the desegregation of the schools. The plaintiffs appealed and the decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

(Swann v Charlotte-Mecklenburg Board of Education, 369 F 2d ..... (Fourth Circuit 1966.).)

VII.

A. On September 6, 1968, the plaintiffs moved the Court for further relief contending that the Board was required to take further steps to disestablish the dual school system in Mecklenburg County.

B. On April 23, 1969, the Court, following several days of testimony heard in March, 1969, entered an Opinion and Order Regarding the Desegregation of the Schools of Charlotte and Mecklenburg County. The Court found that the schools remained segregated, that the pupil assignment system and the placement of the schools continued to racially segregate the pupils, that the faculties had not been adequately desegregated as previously directed by the Court in 1965 and that the Board was to submit a plan for the desegregation of the schools by May 15, 1969.

C. The Order directed the defendants to submit a plan for the active and complete desegregation of the teachers within the system to be effective in the 1969-70 school year and that the plan should seek to apportion teachers to each school in substantially the same ratio (3 to 1) as the ratio of white teachers and black teachers in the system at large.

D. The defendants were also directed to submit a plan and timetable for the active and complete desegregation of the pupils within the system to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970.

E. The Board was directed to consider several methods of desegregation which had been advanced by the plaintiffs, including pairing of grades and schools; feeding elementary schools into junior and senior high schools; combining zones and free choice where each method proceeds logically towards eliminating segregation; bussing and other transportation; setting up large consolidated school units freely crossing city

and county lines to serve larger areas; and to seek aid as may be available from State and Federal agencies.

F. The Court thereafter upon request of defendant, granted an extension of time until May 29, 1969, within which to file its plan.

VIII.

A. On May 15, 1969, the plaintiffs filed a motion for a temporary restraining order seeking to restrain all school construction pending approval by the Court of a school construction plan designed to promote desegregation of the schools.

B. The Board filed its plan on May 28, 1969, as required by the Order of the Court.

C. On June 4, 1969, the Court entered orders setting a date for hearing on the adequacy of the defendant's plan and set forth certain questions to which the parties were to respond at the hearing. In addition, the Court ordered that all members of the Board of Education be added as parties defendant.

D. On June 11, 1969, the plaintiffs filed objections to the plan submitted by the defendant and moved for civil contempt.

E. On June 11, 1969, the defendants moved to set aside the Order of the Court adding the individual Board members as defendants. On June 12, 1969, a similar motion was filed on behalf of the defendant, William E. Poe. The plaintiffs filed a response in opposition to these motions.

F. A hearing was held on the adequacy of the plan and on all pending motions on June 16, 17, and 18, 1969.

IX.

A. The Court entered an Opinion and Order dated June 20, 1969, which was supplemented by additional findings on June 24, 1969.

B. The Court denied the motions of the individual Board members to dismiss and denied plaintiffs' motion for contempt.

C. The Court found that a desegregation plan had been submitted to the Board by the Superintendent, but that the Board struck out virtually all the effective provisions of the plan; that the plan filed as to pupils and teachers was nearly identical to the one previously found racially discriminatory; that the attendance areas of several of the schools were racially gerrymandered; that the defendants had not met their burden to show that the school construction plan would promote the desegregation of the schools.

D. The Court found that desegregation of schools is something that has to be accomplished independent of freedom of transfer.

E. The Court ordered the defendants to prepare and submit by August 4, 1969, a positive plan for the desegregation of the Charlotte-Mecklenburg School System as originally directed on April 23, 1969.

X.

A. The April 23, 1969, Order of the Court contained the following findings by the Court:

> *"The 'Neighborhood School' Theory . . .*
>
> . . .
>
> The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board, today, for example, is transporting 23,000 students on school busses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.
>
> When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which

is quoted above. The neighborhood school theory has no standing to override the Constitution.

Bussing. Under North Carolina General Statutes, § § 115-180, the Board is expressly authorized to operate school busses to transport school children; the state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the area presently eligible for bus service. The present cost of school bussing is about $19 for bus operation plus the cost of the bus which is $4,500 per bus should not exceed $20 per pupil a year. In other words, it costs about $40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about $540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school busses for all legitimate school purposes. Busses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses can not be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down."

B. The Court found that 95% of the blacks were concentrated in the western portion of the City of Charlotte and that official action taken on schools, zoning and planning had contributed to this concentration.

XI.

A. On May 7, 1969, a member of the Mecklenburg County House delegation of the North Carolina General Assembly in-

troduced a bill (House Bill 990, a copy of which is attached hereto as Exhibit B) entitled "AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROTECT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE." The Bill, as subsequently amended, was ratified on July 2, 1969 (See Exhibit A), and is now codified as North Carolina General Statutes §115-176.1.

B. The ratified bill, which has the same title as the bill introduced on May 7, 1969, provides:

1. Students cannot be excluded from any school on account of race.

2. Students shall be assigned to the school within the geographical district where the pupil resides, except for children attending special schools or except for any reason the local board deems sufficient.

3. "*No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.*"

4. The article does not apply in temporary situations of unsuitability of schools or over-crowding.

5. Nor does it apply to "any assignment made pursuant to a choice made by any pupil . . . pursuant to . . . a freedom of choice plan voluntarily adopted by the Board."

XII.

The defendants State Board of Education and State Superintendent of Public Instruction are responsible to insure that the prohibitions against involuntary student assignments and bussing contained in North Carolina General Statutes §115-176.1 are complied with in the Charlotte-Mecklenburg School

System and other administrative units throughout the State and that public funds over which they have control not be used for any such bussing.

XIII.

Involuntary bussing and pupil assignments which are prohibited by North Carolina General Statutes §115-176.1 are necessary devices to carry out the existing orders of this and other Federal Courts in North Carolina and to comply with the duties imposed by the Constitution upon defendants herein and other school officials in North Carolina. The purpose, motive and effect of provisions of North Carolina General Statutes §115-176.1 complained of herein, is to forbid these defendants and other school officials in North Carolina from complying with existing lawful orders of this and other Federal Courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution in the State of North Carolina. The provisions thus violate the constitutional rights of plaintiffs and others similarly situated.

XIV.

Plaintiffs and those similarly situated and affected, on whose behalf this action is brought are suffering irreparable injury and will suffer irreparable injury in the future by reason of the provisions of the Statute complained of herein. They have no plain, adequate or complete remedy to redress the wrongs complained of herein other than this action for a declaratory judgment and injunction. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits and would cause further irreparable injury.

WHEREFORE, plaintiffs respectfully pray that, upon the filing of this Supplemental Complaint, the Court:

1. Issue a temporary restraining order restraining the defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing,

administering, or applying the provisions contained in North Carolina General Statutes §115-176.1 complained of herein;

2. Convene a three-judge District Court as required by 28 USC § §2281 and 2284;

3. Advance this cause on the docket and order a speedy hearing of this action according to law and upon such hearing:

a. Enter judgment declaring the statutory provisions complained of herein void as repugnant to the Thirteenth and Fourteenth Amendments to the Constitution of the United States;

b. Enter a preliminary and permanent injunction restraining all defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing, administering, or applying the complained provisions of North Carolina General Statutes §115-176.1;

c. Allow plaintiffs their costs herein, reasonable attorneys fees and such other and further relief as to the Court may appear equitable and just.

Respectfully submitted,

Adam Stein

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Supplemental Complaint was served upon counsel for the Charlotte-Mecklenburg Board of Education; William E. Poe; Henderson Belk; Dan Hood; Ben F. Huntley; Betsey Kelly; Coleman W. Kerry, Jr.; Julia Maulden; Sam McNinch, III and Carlton G. Watkins, defendants, by depositing copies of same in the United States Mail, postage prepaid, addressed to:

Brock Barkley, Esq.
Law Building
Charlotte, North Carolina 28202;

William J. Waggoner, Esq.
Weinstein, Waggoner, Sturges and Odom
1100 Barringer Office Tower
Charlotte, North Carolina 28202; and

Gaston H. Gage, Esq.
Grier, Parker, Poe, Thompson,
Bernstein, Gage and Preston
1014 Law Building
Charlotte, North Carolina 28202

This 21st day of July, 1969.

Adam Stein
Attorney for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants	)	NO. 1974

ORDER

Upon motion by plaintiffs for leave to file a supplemental complaint and add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction for the State of North Carolina as defendants and it appearing to the Court that good cause is shown therefor

It is ORDERED that plaintiffs' motion for leave to file a supplemental complaint and to add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants is granted.

The United States Marshal is directed to serve the supplemental complaint and summons upon the above named defendants.

This 22 day of July, 1969.

James T. McMillan
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLLIPS, Superintendent of Public Instruction of the State of North Carolina, Defendants.	)	CIVIL ACTION NO. 1974

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT, TO ADD ADDITIONAL DEFENDANTS AND FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by their undersigned counsel, respectfully move the Court for leave to file a Suplemental Complaint and for a temporary restraining order restraining the defendants from giving consideration or effect to and from enforcing, administering, or applying certain provisions of North Carolina General Statutes §115-176.1 and as grounds therefor show the following:

1. Plaintiffs seek, by this motion, leave to file a Supplemental Complaint, copies of which are being forwarded this day to the Court together with summonses for service upon the

North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina, parties which the plaintiffs seek to add as defendants to this action. Plaintiffs have served copies of the Supplemental Complaint upon counsel for those defendants now parties to this action.

2. The Supplemental Complaint seeks injunctive and declaratory relief against the following prohibitions contained in North Carolina General Statutes §115-176.1[1]

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

3. For reasons stated more fully in the Supplemental Complaint, plaintiffs allege that the purpose, motive and effect of the statutory provisions complained of therein is to forbid the defendants, now parties to this action, and other school officials in the State of North Carolina from complying with existing lawful orders of this and other courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs allege that this is so because compulsory assignments and involuntary bussing, prohibited by North Carolina General Statutes §115-176.1, are necessary devices for complying with the orders of this Court entered on April 23, 1969, and June 20, 1969, and for complying with constitutional requirements.

4. Plaintiffs seek to add as parties-defendant, the North

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1. North Carolina General Statutes §115-176.1 was enacted as Chapter 1274 of the Session Laws of the 1969 North Carolina General Assembly which was ratified on July 2, 1969. A copy of the Ratified Bill is attached to the Supplemental Complaint as Exhibit A.

Carolina State Board of Education and Dr. A. Craig Phillips, the Superintendent of Public Instruction. These parties are charged by the constitution and laws of the State of North Carolina with the general supervision and administration of the public schools and the disbursement of public funds to the various public schools in North Carolina. They are thus required by North Carolina law to insure that public funds are not spent for involuntary bussing and pupil assignments. They are therefore proper and necessary parties to an adjudication of the constitutional issues raised by the plaintiffs in the Supplemental Complaint. In addition, they are proper parties to this proceeding because, they, together with local school officials have an affirmative duty to take active steps to disestablish the dual school system in Charlotte-Mecklenburg County and other administrative units throughout the State.

5. Plaintiffs, in their Supplemental Complaint, request that a three-judge Court be constituted to determine their constitutional challenge to a statute of state-wide application. This motion for a temporary restraining order is addressed to the single District Court judge hearing this case pursuant to 28 U.S.C. §2284 (3).

6. Plaintiffs allege that, unless immediately restrained, the defendants will apply the statutory provisions complained of herein and will thereby fail to comply with the orders of this Court of April 23 and June 20, 1969, thus causing plaintiffs irreparable damage. In support of this allegation, the plaintiffs attach hereto the affidavit of Reginald A. Hawkins, the next friend of plaintiffs in this action.

WHEREFORE, plaintiffs respectfully pray that they be granted leave to file their Supplemental Complaint, that they be allowed to add the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants in this action and that all defendants be restrained from enforcing the complained of provisions of North Carolina General Statutes §115-176.1.

Respectfully submitted,
/s/ Adam Stein

CONRAD D. PEARSON
203 1/2 East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina

JACK GREENBURG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Leave to File Supplemental Complaint, to Add Additional Defendants and for Temporary Restraining Order was served upon counsel for the Charlotte-Mecklenburg Board of Education; William E. Poe; Henderson Belk; Dan Hood; Ben F. Huntley; Betsey Kelly; Coleman W. Kerry, Jr.; Julia Maulden; Sam McNinch, III and Carlton S. Watkins, defendants, by depositing copies of same in the United States Mail, postage prepaid, addressed to:

Brock Barkley, Esq.
Law Building
Charlotte, North Carolina 28202;

William J. Waggoner, Esq.
Weinstein, Waggoner, Sturges and Odom
1100 Barringer Office Tower
Charlotte, North Carolina 28202; and

Gaston H. Gage, Esq.
Grier, Parker, Poe, Thompson,
Bernstein, Gage and Preston
1014 Law Building
Charlotte, North Carolina 28202

This 21st day of July, 1969.

/s/ Adam Stein
Attorney for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al., Plaintiffs,	)	
v.	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, Defendants.	)	CIVIL ACTION NO. 1974

ANSWER OF THE DEFENDANTS, THE NORTH CAROLINA STATE BOARD OF EDUCATION AND SUPERINTENDANT OF PUBLIC INSTRUCTION OF THE STATE OF NORTH CAROLINA, TO THE SUPPLEMENTAL COMPLAINT.

(1) Answering the allegations of Paragraph I of the Supplemental Complaint, these answering defendants allege that the order allowing the plaintiffs to file a supplemental complaint is based upon a motion which was filed in the Office of the Clerk of the Federal Court for the Western District on July 22, 1969, and the order of the Judge of the District Court was also filed on the same date, July 22, 1969, and said order allowing said Supplemental Complaint to be filed is void, invalid and

contrary to due process of law for that the North Carolina State Board of Education and the State Superintendent of Public Instruction were never given an opportunity to appear before the Court and resist said Motion, but, to the contrary, the same is an exparte order entered without service upon the said defendants of any notice or copy of said motion prior to the granting of said order; it is admitted that there is quoted in Paragraph I of the Supplemental Complaint a portion of Chapter 1274 of the Session Laws of 1969 of the General Assembly of this State; it is denied that the plaintiffs are entitled to any preliminary and permanent injunction as against these State defendants or that the plaintiffs are entitled to a declaratory judgment as against these defendants.

(2) Answering the allegations of Paragraph II of the plaintiffs' Supplemental Complaint, it is denied that this Court has jurisdiction as against these State defendants under the Federal statutes cited in said paragraph or under the constitutional provisions cited in said paragraph; it is denied that G. S. 115-176.1 is unconstitutional and invalid or that the plaintiffs are entitled to any declaratory judgment or the convening of a 3-judge federal court; the allegations of Paragraph II are, therefore, untrue, and are denied.

(3) The allegations of Paragraph III are untrue and are denied except the allegation as to the status of the plaintiffs being the same plaintiffs who instituted the original action; it is denied that the plaintiffs are entitled to maintain a class action as against these State defendants.

(4) Answering the allegations of Paragraph IV, these State defendants have nothing to do with the defendants named as the Charlotte-Mecklenburg Board of Education and the individual members thereof, and, therefore, are not required to answer the allegations of subparagraph (a) of Paragraph IV of the Complaint; it is alleged, therefore, that the duties of North Carolina State Board of Education and of Dr. A. Craig Phillips are fixed by State statutes, and, therefore, the allegations of subparagraphs (b) and (c) are denied.

(5) The allegations of Paragraph V are admitted.

(6) The allegations of Paragraph VI are admitted.

(7) Answering the allegations of Paragraph VII, these State defendants allege that the same relate to a motion for further relief filed against the Charlotte-Mecklenburg Board of Education, hearings on same, orders to submit plans of desegregation and matters with which these State defendants are not concerned, and these State defendants allege that they are not required to answer said Paragraph VII.

(8) The allegations of Paragraph VIII of the Complaint relate to matters with which these State defendants are not concerned and of which they have no knowledge or information sufficient to form a belief as to the truth of same, and as to these State defendants the allegations of said paragraph are, therefore, denied.

(9) Answering the allegations of Paragraph IX, these State defendants allege that said allegations relate to matters that these defendants are not concerned with and with which these State defendants have not knowledge or information sufficient to form a belief to form the truth of same and as to these defendants said paragraph is, therefore, denied.

(10) Answering the allegations of Paragraph X, the State defendants allege that whatever appears in the orders of the Court previous to the filing of this Supplemental Complaint are matters or record, and, therefore, they are not required to answer as to same.

(11) Answering the allegations of Paragraph XI, these State defendants allege that the General Assembly of North Carolina at its Session of 1969 enacted into law an Act which is now codified as G. S. 115-176.1 and that said Act was ratified on July 2, 1969; that said Act speaks for itself as to its contents, and except as herein admitted the allegations of Paragraph XI are untrue and are denied.

(12) The allegations of Paragraph XII are untrue and are, therefore, denied.

(13) The allegations of Paragraph XIII are untrue and are, therefore, denied.

(14) The allegations of Paragraph XIV are untrue and are, therefore, denied.

WHEREFORE, having fully answered, these State defendants pray the Court that this action as to the State defendants be dismissed, that the plaintiffs take nothing by their action as to these State defendants and that the State defendants have and recover their costs to be taxed by the Clerk of this Court.

Robert Morgan
Attorney General of North Carolina

Ralph Moody
Deputy Attorney General

Andrew A. Vanore, Jr.
Staff Attorney

P. O. Box 629
Justice Building
Raleigh, North Carolina 27602

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing answer of North Carolina State Board of Education and State Superintendent of Public Instruction was served upon Counsel for the Plaintiffs by depositing a copy of same in the United States Mail, postage prepaid, addressed to Chambers, Stein, Ferguson and Lanning, Attorneys at Law, 216 West Tenth Street, Charlotte, North Carolina 28202.

This the 8th day of August, 1969.

Ralph Moody
Deputy Attorney General of
North Carolina.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JAMES E. SWANN, et al.,
Plaintiffs,
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,
Defendants,
and
HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,
Additional
Parties-Defendant.

CIVIL ACTION NO. 1974

MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF

On February 5, 1970, this Court entered an order directing the Charlotte-Mecklenburg Board of Education and the individual members of the Board to proceed immediately to desegregate the public schools of Charlotte-Mecklenburg County. The Court directed that students be assigned to the various schools under plans presented and adopted by the Board and a plan prepared by the Court's consultant, Dr. John A. Finger. The order provided for changing attendance zones of some schools, pairing of some schools, and transportation of students living beyond "walking distance" from the schools to which assigned. The order further directed that the plan be implemented for elementary schools no later than April 1, 1970 and for secondary schools no later than May 4, 1970. The School Board was specifically directed to begin immediately with steps to implement the plan.

Prior to the filing of the order on February 5, 1970, Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr, and Robert T. Wilson, on their behalf and on the behalf of the Concerned Parents Association, an unincorporated association, brought a proceeding in the Superior Court of Mecklenburg County, by their attorney, William H. Booe, to obstruct and prevent the School Board from implementing the orders directed by this Court. They obtained from the Superior Court of Mecklenburg County an *ex parte* order specifically enjoining the Superintendent from implementing the order of this Court directing the Board to pay the expenses and fees of the Court consultant.

Following the order of February 5, 1970, Tom B. Harris, G. Don Roberson and others of the Concerned Parents Association have sought and are seeking by various means to obstruct and prevent implementation of the Court's orders. On February 12, 1970, they obtained from the Honorable William K. McLean, Judge Presiding in the Superior Court of Mecklenburg County, an order enjoining the School Board from spending

any funds to purchase and operate school buses as directed by this Court.

The Honorable Robert H. Scott, Governor of the State of North Carolina, on February 11 and 12, 1970, objected to the Court's order and directed that no public funds, state or local, be expended for the purpose of implementing the order. The Honorable Dr. A. Craig Phillips, State Superintendent of Public Instruction, and the North Carolina State Board of Education, defendants herein, joined with the Governor in objecting to the Court's order and in directing that no public funds be used for the purpose of implementing the order.

On February 6, 1970, Honorable James Carson, a member of the Mecklenburg Delegation to the North Carolina House of Representatives, threatened to and is preparing to file similar proceedings in the State Court of North Carolina to obstruct and thwart the enforcement of the Court's orders.

These parties, along with divers others, are seeking to obstruct and prevent implementation of the Court's orders directing compliance by the school authorities with their constitutional obligations.

Despite the Court's directive to the School Board to proceed forthwith with all necessary steps to implement the order, the School Board, the State Superintendent and the State Board of Education have failed to do so. Plaintiffs are advised that no efforts have been made to secure the necessary buses for transporting students as directed by the Court. Plaintiffs are also advised that such buses as may be necessary can be ordered and manufactured by the time directed by the Court for implementation of the plan. The failure of the School Board to act now in securing the necessary facilities for transportation may prevent desegregation of the schools in the time directed.

Plaintiffs are advised, believe and so allege that the activities and conduct of the defendants and each of them are pursuant to a design to thwart, impede and prevent desegregation of the public schools of Charlotte-Mecklenburg County and that the

acts, activities and conduct of the defendants were calculated and intended to incite disobedience of the law and the overthrow of law and order and to coerce, intimidate, and compel school officials from performance of their constitutional responsibilities to desegregate the public schools of this system.

In order to insure full implementation of the Court's order within the time directed, plaintiffs, by their undersigned counsel, respectfully move the Court that the following parties be added as parties-defendant in this proceeding:

Honorable Robert H. Scott, Governor of the State of North Carolina;

Honorable A. C. Davis, Controller of the State Department of Public Instruction;

Honorable William K. McLean, Judge of the Superior Court of Mecklenburg County;

Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr, Robert T. Wilson, and the Concerned Parents Association, an unincorporated association in the Mecklenburg County;

James Carson and William H. Booe.

Plaintiffs further pray the Court for a temporary and permanent injunction dissolving the injunctive orders of the Superior Court of Mecklenburg County entered in the proceeding of Tom B. Harris, et al. v. William C. Self, et al., 70 CVS 1097, and temporarily and permanently restrain any further proceedings in the action.

Plaintiffs further pray the Court for a temporary and permanent injunction against all defendants and all other parties having notice of the Court's order enjoining all parties in this action and all parties having notice of the orders of this Court from initiating or proceeding with any action in any State Court which has the purpose or effect of interfering with outstanding orders in this cause.

Plaintiffs further pray that the Court enter a temporary and permanent injunction restraining the Governor, the State Board of Education, the Controller of the State Department of Public Instruction, and the State Superintendent of Public Instruction from denying State funds or taking any other steps which would prevent or tend to prevent the implementation of the orders of this Court.

Plaintiffs further pray the Court for a temporary and permanent injunction directing the local Board of Education, its members individually, the Governor of the State, the State Board of Education, the State Superintendent of Public Instruction, and all other persons having any authority or responsibility in the administration of the public schools in Charlotte-Mecklenburg County to proceed forthwith with all necessary steps to implement the orders of this Court, including the provision requiring transportation of students living more than "walking distance" from the schools to which they are assigned. Plaintiffs further pray the Court for a temporary and permanent injunction restraining all defendants from taking any steps or action which would inhibit or prevent or tend to prevent compliance with the orders of this Court.

Plaintiffs further pray the Court that they be allowed their costs in this proceeding and reasonable counsel fees.

Plaintiffs further pray that the Court direct the United States Marshal to personally serve a copy of the complaint, the amended complaint, and all orders, including the injunctive order prayed for herein, upon all defendants named herein.

Respectfully submitted,

CONRAD O. PEARSON
203 1/2 East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON AND LANNING
216 West Tenth Street
Charlotte, North Carolina

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served copies of the foregoing Motion to Add Additional Parties Defendant and For Further Relief upon counsel for defendants by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

Brock Barkley, Esq.
Law Building
Charlotte, North Carolina 28202;

William J. Waggoner, Esq.
Weinstein, Waggoner, Sturges and Odom
1100 Barringer Office Tower
Charlotte, North Carolina 28202

Gaston H. Gage, Esq.
Grier, Parker, Poe, Thompson,
Bernstein, Gage and Preston
1014 Law Building
Charlotte, North Carolina 28202

Honorable Robert Morgan
Attorney General of the State of
North Carolina
Raleigh, North Carolina 27602

James H. Carson, Jr., Esq.
Law Building
Charlotte, North Carolina

William H. Booe, Esq.
Law Building
Charlotte, North Carolina

Benjamin S. Horack, Esq.
806 East Trade Street
Charlotte, North Carolina 28202

This 13th day of February, 1970.

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 1974

JAMES E. SWANN, et al,
Plaintiffs,
-vs-
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,
Defendants,
and
HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,
Additional Parties-Defendant.

ORDER

Upon motion duly made, IT IS HEREBY ORDERED that the following persons and organizations described in the petition of the plaintiffs as additional parties-defendant be, and they are hereby made parties herein:

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina

HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction

HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of North Carolina

TOM B. HARRIS, Charlotte, North Carolina

G. DON ROBERSON, Charlotte, North Carolina

A. BREECE BRELAND, Charlotte, North Carolina

JAMES M. POSTELL, Charlotte, North Carolina

WILLIAM E. RORIE, JR., Charlotte, North Carolina

CHALMERS R. CARR, Charlotte, North Carolina

ROBERT T. WILSON, Charlotte, North Carolina

CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County, North Carolina

JAMES H. CARSON, JR., Attorney, Charlotte, North Carolina

WILLIAM H. BOOE, Attorney, Charlotte, North Carolina

It is directed that service of the following documents be made immediately by certified mail, return receipt requested, upon the additional parties hereby made:

1. MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF, with attached POINTS OF AUTHORITY, served by plaintiffs on February 13, 1970.

2. NOTIFICATION AND REQUEST FOR DESIGNA-

TION OF THREE-JUDGE COURT, dated February 19, 1970, including exhibits referred to therein, as follows:

Exhibit A—OPINION AND ORDER filed December 1, 1969.

Exhibit B—ORDER filed February 5, 1970.

Exhibit C—ORDER filed December 2, 1969.

Exhibit D—Complaint, amended complaint and two orders entered by Judge William K. McLean on February 12, 1970, in suit pending in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, bearing No. 70-CVS-1097.

Exhibit E—Statement made by Governor Robert W. Scott on February 11, 1970.

Exhibit F—Letter dated February 12, 1970, written by Governor Robert W. Scott to Dr. W. L. Turner, Director of the North Carolina Department of Administration.

Exhibit G—Statement made by Dr. A. Craig Phillips on February 11, 1970.

3. DESIGNATION OF THREE-JUDGE COURT, filed February 24, 1970.

The plaintiffs are directed to prepare and file on or before Monday, March 2, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

The other parties are directed to prepare and file on or before Friday, March 6, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

If there is any additional evidence which any party desires to introduce by deposition or affidavit, the court will receive such evidence, in written form, up to and including Friday,

March 6, 1970. It is not contemplated that any more oral testimony in a court hearing will be necessary.

The hearing before the three-judge court will not be an evidentiary hearing, but will be a hearing based upon the record which has been developed by the time of the hearing.

This the 25th day of February, 1970.

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

JAMES E. SWANN, et al., Plaintiffs, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, et als., Defendants. AND HONORABLE ROBERT H. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et als., Additional Parties Defendant.	)	CIVIL ACTION NO. 1974

ANSWER TO MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF

THE DEFENDANTS, THE NORTH CAROLINA STATE BOARD OF EDUCATION, DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION, ROBERT H. SCOTT, GOVERNOR OF THE STATE OF NORTH CAROLINA, A. C. DAVIS, CONTROLLER OF THE STATE DEPARTMENT OF PUBLIC INSTRUCTION, AND WILLIAM K. McLEAN, JUDGE OF THE SUPERIOR COURT OF MECKLENBURG COUNTY (hereinafter referred to as: STATE OFFICIALS), ANSWERING THE MOTION TO ADD ADDITIONAL PARTIES DEFENDANT, AND FOR FURTHER RELIEF, FOR THEIR ANSWERS ALLEGE:

(1) It is admitted that on February 5, 1970, the District Court of the United States for the Western District of North Carolina entered an order directing the Charlotte-Mecklenburg Board of Education to desegregate the public schools administered by said Board; it is further admitted that the Court ordered that students be assigned to the various public school facilities of said Board under plans adopted by the Board and by the Court's consultant, and all orders and plans are referred to and made a part of this allegation not for the purpose of acquiescing therein or admitting the validity thereof, but for the purpose of showing the action taken by the Court and the action taken by the Board; it is denied that any action to which the motion of the plaintiffs refers was taken by the Charlotte-Mecklenburg Board of Education as a voluntary act on the part of said Board, but, to the contrary, these defendants allege that each such action taken was compelled by orders of the Court; the plaintiffs themselves in their allegations refer to orders of the Court and directives of the Court.

(2) It is admitted that a group of individuals, an unincorporated association by the name of "Concerned Parents Association", instituted an action in the Superior Court of Mecklenburg County and obtained an order from a Superior Court judge enjoining the superintendent from paying expenses and fees of the Court consultant; that said civil action now pending in the Superior Court of Mecklenburg County and all its pleadings, orders and proceedings are hereby referred to and made a part of this Answer; it is further alleged that said "Concerned Parents Association" had a right under the laws of the State of North Carolina to institute said action, which is related to the use of public funds, including the proceeds of taxes collected from and paid by members of the said Association and other persons similarly situated; it is admitted that said civil action in the Superior Court of Mecklenburg County was instituted prior to the filing of the Order of the District Court of the United States on February 5, 1970.

(3) It is admitted that on February 12, 1970, the "Concern-

ed Parents Association" obtained an order from the Judge of the Superior Court of Mecklenburg County, enjoining the Charlotte-Mecklenburg Board of Education from spending any public funds to purchase and operate school buses for the purpose of redressing any racial imbalance. It is denied, however, that said Order was obtained to obstruct the enforcement of any lawful order of the District Court of the United States, but, to the contrary, said Order was obtained to prevent the busing of school children for the purpose of changing the racial composition of the student enrollment in specific public schools by compelling school children to attend a specific public school contrary to the will of their parents solely because of the race of such children, contrary to the Fourteenth Amendment to the Constitution of the United States as construed in BROWN v. BOARD OF EDUCATION, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 ALR 2d 1180, and contrary to the Civil Rights Act of 1964, and Chapter 1274 of the Session Laws of 1969, enacted by the General Assembly of North Carolina; that the Superior Court of Mecklenburg County had a legal right to pass upon the statutes and status of busing pupils and to enter the order therein complained of by the plaintiffs, and the prosecution of the action in the State courts is not subject to injunction or restraint on the part of the District Court of the United States; that the action in the State courts is lawfully brought therein to enjoin the unlawful expenditure of State funds and County funds, these being a matter of State law over which the United States District Court has no jurisdiction.

(4) It is admitted that Robert H. Scott, Governor of the State of North Carolina, ordered and directed that no public State funds be expended for the busing of public school pupils to redress racial imbalance as he had a right and duty to do under the Executive Budget Act of the State of North Carolina inasmuch as he was dealing with and preventing an unlawful expenditure of the State's public funds which are subject to the control of the State of North Carolina and its administrative authorities; that the lawful use which may be made of such funds is a matter of State law and involves no question arising

under the Constitution or laws of the United States; it is further admitted that the State Superintendent of Public Instruction of North Carolina and the defendant, North Carolina State Board of Education, approve the action taken by the Governor of North Carolina in the use of State funds, which, it is alleged, do not belong to the Federal Government, and which are not subject to allocation by agents of the Federal Government; that said action was taken pursuant to the statutes above referred to, which prohibit the use of the said State funds for the busing of public school children for the mere purpose of redressing racial imbalance.

(5) That these defendants, State officials, do not know the motives and intentions of the Honorable James Carson, a member of the House of Representatives of the State of North Carolina, and, therefore, for lack of information and belief deny the allegations related to the Honorable James Carson and also deny the allegations as to the motives and intentions of other persons in relation to said Court order for lack of information and belief.

(6) It is denied that the North Carolina State Board of Education and the State Superintendent of Public Instruction have any statutory duties or any duties at all in regard to the transportation of school children; it is further alleged that the local boards of education are under no legal duty to provide transportation for school children to, from and between their homes and the schools in which said children are enrolled; that said Board of Education has no authority or control over the transportation of pupils in the public school system, and neither the Governor of North Carolina nor the North Carolina State Board of Education is required or permitted to allocate funds for public school transportation of pupils for purposes prohibited by Federal and State statutes; that these defendants, State officials, do not know the intentions of the Charlotte-Mecklenburg Board of Education as to providing school buses for the transportation of school pupils to redress racial imbalance, and, therefore, deny all allegations relating to said subject.

(7) It is denied that these defendants are seeking to prevent desegregation of the public schools administered by the Charlotte-Mecklenburg Board of Education or to thwart any proper activity of this Court; it is further denied that these defendants are inciting disobedience of the law and seeking the overthrow of law and order or to coerce, or compel, school officials to desist or refrain from any duty imposed upon them by the Constitution or laws of the United States; that these defendants, State officials, are informed and believe, and so allege, that they have no authority to and may not lawfully be required to use State public funds contrary to the provisions of Chapter 1274 of the Session Laws of 1969, which expressly prohibits the use of such funds for the purpose of financing the transportation of public school children to, from and between their homes and the school wherein they are enrolled for the purpose of changing the ratio of the children of the respective races attending such schools or any other school; that A. C. Davis is Controller of the State Board of Education and not the Controller of the State Department of Public Instruction; that the said Davis is an administrative officer only, and, as such, does not determine the policy of the State of the expenditure of public State funds for public school transportation and is not a proper and necessary party to this action; that the Governor of North Carolina is not a proper and necessary party to this action and should not be added as a party defendant, and such addition would constitute a suit against the State as prohibited by the Eleventh Amendment to the Constitution of the United States; that the Honorable William K. McLean is a Judge of the Superior Court of the State of North Carolina, and, as such, has the lawful right, authority and duty to hear and determine any and all civil actions instituted in any such Court over the sessions of which he is lawfully assigned to preside; that the action instituted on or about February 12, 1970, in the Superior Court of Mecklenburg County, to which reference is made in the motion of the plaintiffs in the present action, was lawfully instituted therein and it is the lawful right, authority and duty of the Honorable William McLean, or such

other judge as may from time to time be lawfully assigned to preside over the sessions of said Court, to hear and determine, subject to lawful appellate review, all issues of law and fact which have arisen or may arise in such action, and he may not lawfully be restrained from the lawful exercise of such jurisdiction and authority by the Order of this Court; that under the appropriate Federal statute of the United States Code (28 USCA 2283) he is immune from any restraint on the part of this Court which would prohibit him from hearing and lawfully determining the issues of law and fact in civil actions lawfully initiated in the said Superior Court, including said action to which the Motion of the plaintiffs in this action refers, and he is immune from restraint on the part of the Federal Court in the exercise by him of the said jurisdiction and authority to hear and determine, subject to lawful appellate review, all issues of law and fact arising in the said action, and, therefore, he may not lawfully be made a party to this action in this Court.

(8) That the plaintiffs are not entitled to a temporary or permanent injunction restraining the actions of these defendants, said State officials, nor are the plaintiffs entitled to any mandatory injunction requiring these defendants, State officials, to proceed with providing transportation to or for public school students; that all allegations as to issuance of injunctions relating to these defendants, State officials, are untrue and are denied; it is denied that as to these defendants, State officials, the plaintiffs are entitled to any costs or counsel fees.

WHEREFORE, having fully answered said Motion, these defendants, State officials, pray the Court as follows:

(a) That as to these defendants, State officials, the said Motion be dismissed;

(b) that all applications and requests for injunctions relating to the busing of the public school pupils for the redress of racial imbalance, or for any other purpose, as to these defendants, be dismissed and denied;

(c) that the plaintiffs' request for costs and counsel fees as to these defendants be denied;

(d) for such other and further relief as to the Court may seem proper and just, and that these defendants recover their costs incurred herein.

Robert Morgan
Attorney General of North Carolina

Ralph Moody
Deputy Attorney General

Andrew A. Vanore, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Ralph Moody, Deputy Attorney General of North Carolina, do hereby certify that I served copies of the foregoing Answer to Motion to Add Additional Parties Defendant and for Further Relief by depositing a copy of same in the United States Post Office, with postage prepaid, and addressed to Counsel as follows: Chambers, Stein, Ferguson and Lanning, 216 West 10th Street, Charlotte, North Carolina 28202; Brock Barkley, Law Building, Charlotte, North Carolina 28202; William J. Waggoner, 1100 Barringer Office Tower, Charlotte, North Carolina 28202; Gaston H. Gage, 1014 Law Building, Charlotte, North Carolina 28202; James H. Carson, Jr., Law Building, Charlotte, North Carolina 28202; William H. Booe, Law Building, Charlotte, North Carolina 28202; Benjamin H. Horack, 806 East Trade Street, Charlotte, North Carolina 28202.

This the — day of February, 1970.

RALPH MOODY
Deputy Attorney General of
North Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

James E. Swann, et al,)
Plaintiffs,)
)
-vs-)
) CIVIL 1974
The Charlotte-Mecklenburg Board of Education, et al,)
Defendants.)

DEPOSITION OF:
JAMES H. CARSON, JR.
March 11, 1970

By consent this deposition was taken on March 11, 1970, at 11:15 A.M., in the offices of Chambers, Stein, Ferguson & Lanning, Attorneys at Law, 216 W. 10th Street, Charlotte, North Carolina.

By consent all objections except as to the form of the question are waived and objections will be made and ruled on at the time of trial. With the consent of all counsel, signature is waived.

APPEARANCES:

Plaintiffs—Julius L. Chambers, Esq.
Attorney at Law
Charlotte, North Carolina

Adam Stein, Esq.
Attorney at Law
Charlotte, North Carolina

Defendants—William J. Waggoner, Esq.
Attorney at Law
Charlotte, North Carolina

JAMES H. CARSON, Jr.,
having first been duly sworn, was examined and testified as follows:

BY MR. CHAMBERS:

Q Would you state your name, please?

A James H. Carson, Jr.

Q What is your address, Mr. Carson?

A 419 Ellsworth Road, Charlotte.

Q What is your occupation?

A I am an attorney.

Q Did you serve as a member of the Mecklenburg delegation to the North Carolina Legislature during the 1969 session?

A Yes, I served as a member from the 36th House District which is composed of only Mecklenburg County.

Q How long have you served in the Legislature?

A I was elected for the first time in 1966 and re-elected in 1968. I'm still in office.

Q Did you during the session of the 1969 Legislature have occasion to propose a bill that has now been enacted and is known as North Carolina General Statute Section 115-176.1?

A Yes, I did.

Q I show you a document which we would like to have marked as Plaintiff's Exhibit 1 for Mr. Carson's deposition. (Carson Deposition Exhibit #1 marked for identification and attached to all copies of this deposition.) I'll ask you if you would state whether that is a copy of the bill that you introduced.

A The exhibit consists of several items, one of which is a copy of the bill I introduced.

Q Would the last two pages of that exhibit be the bill as you originally introduced it?

A Yes, that's correct, the one entitled House Bill DRH 255.

Q And they are the last two pages on the exhibit?

A Yes, that's correct.

Q The third page from the back, which is the fifth page in the exhibit from the front, headed Amendment, dated June 16, '69, would this be a proposed amendment that was also incorporated in the bill?

A Yes, it would.

MR. WAGGONER: May I have a copy of this?

MR. CHAMBERS: I'm sorry.

Q Now, the third and fourth pages from the front, would you state what these two pages are?

A This is a House Committee Substitute for House Bill 990, which is the same bill.

Q Is it amended in any way from the bill as you originally introduced it?

A Yes. A Committee Substitute is used when a bill is rewritten to any degree to get a Committee Substitute rather than the original bill.

Q What changes were made in the Committee Substitute?

A I would have to read both bills to tell you the exact changes. You can see they are both here and the changes included in each of them were made in the Committee Substitute.

Q The first page and the second page of this exhibit, are these also amendments that were added to the bill?

A Yes. These are two amendments that were put into the Committee Substitute when it was considered in the Senate.

Q And were these amendments as indicated on the first two pages adopted by the House and the Senate?

A Yes, they were. They were adopted by the Senate and the House concurred in the Senate amendments.

Q Now, when did you initially propose the bill that subsequently became General Statute 115-176.1?

A By proposed, do you mean when did I introduce it?

Q Yes.

A I do not recall the exact date.

Q Do you recall the month?

A Of my own knowledge, no, I do not recall the month.

Q I show you another document which we would like marked as Plaintiff's Exhibit 2 for purposes of Mr. Carson's deposition. (Carson Deposition Exhibit #2 marked for identification and attached to all copies of this deposition.) Now, this document on the first page contains a news article headed "House Gets Busing Bill", June 12, 1969. To your knowledge would the bill have been presented to the House in June of 1969?

A To the best of my knowledge it was before the month of June when it was first introduced, either in April or May and I don't recall which month.

Q Do you recall whether it was subsequent to the Court's order entered in this case on April 23, 1969?

A No, I do not recall. I believe it was subsequent to that but I do not recall.

Q Now, as initially proposed, what was your purpose or what were you trying to remedy in proposing this bill?

MR. WAGGONER: Objection.

A The purpose of the bill, I think, could be best summed up by the title of the bill, that is, a bill to protect the neighborhood school system and to prohibit the involuntary busing of pupils outside the district in which they reside.

Q As initially proposed did you intend to prohibit consideraation of race in the assignment of pupils?

MR. WAGGONER: Objection.

A The original bill does not mention race. It doesn't prohibit it or do anything else with it.

Q Are you familiar with the present provisions of the State in providing transportation for students?

A I'm vaguely familiar with them, yes. I'm not an expert on the subject.

Q Do you know whether the State presently provides transportation for students?

A Yes, I do know that under certain circumstances they do.

Q Do you recall what circumstances?

A To the best of my knowledge they provide transportation for pupils outside cities who live a mile and a half or more than a mile and a half from the school to which they are assigned and inside of cities in areas which have been recently incorporated, I believe since '57, the same provision applies.

Q Are you familiar with the North Carolina constitutional provision that required separation of the races in public education?

A Yes, I am.

Q Are you familiar with the previous practices of this School Board in providing transportation of students on a segregated basis?

A No, I'm really not familiar with it. I imagine it was done but this was some years ago and I'm not that familiar with it now.

Q Do you know whether the School Board has provided transportation, this School Board, for Negro students going to Negro schools and white students going to white schools?

A No, I do not. I have never been on a school bus myself. I lived near the school I attended and I do not know.

Q You do know we have had segregated schools in this system.

A Yes, I do.

Q And you do know that transportation was provided during the period that we had segregated schools.

A I suppose outside of the city it was. Of my own knowledge, though, I do not know.

Q I show you a copy of the exhibit that was attached to the supplemental complaint filed by the plaintiffs in this case which shows the bill with the date May 7. Does that refresh your recollection as to the date of the bill?

A No. I would assume May 7th is correct because it's stamped on the bill but I do not recall of my own personal knowledge.

Q You don't have any reason to believe that it wasn't May 7.

A No, I do not.

Q Now, do you know the number of students in Mecklenburg County who are transported daily to school?

A No, I do not.

Q Do you know the number of pupils transported to school daily across the State of North Carolina?

A No, I do not.

Q Do you know the average mileage traveled by buses each day in transporting students to school in Mecklenburg County?

A I have no idea what that would be.

Q Now, did you know the number of students or the average miles per day traveled when you introduced this bill?

A The average number of students in Mecklenburg County?

Q Yes.

A No, I did not.

Q Or the average number in the State?

A No, I did not.

Q Or the average mileage?

A No, I did not.

Q Do you know the purpose of the State in providing transportation for students?

A I would assume that the purpose is to provide transportation primarily for the rural children who live some distance from school and who would find it difficult to arrange their own transportation.

Q Do you know how long the State has been providing transportation at public expense?

A Ever since I can remember, which would be twenty-five or so years. I'm sure it's been longer than that, though.

Q The proposed amendment that you submitted June 16, 1969, what was the purpose of this amendment?

MR. WAGGONER: Objection.

A This amendment, as best I recall, was aimed at providing some type of temporary assignment whereby if a school were damaged by fire or something else it would require a temporary assignment and would require pupils to be transported to another school district.

MR. WAGGONER: Move to strike.

Q Look at the first two pages of Exhibit 1. The first proposed amendment would strike the balance of the sentence on Page 1, Lines 14 and 15, following the word "various" and would add "races, creeds, colors or national origins from the community".

A Yes, I'm looking at it.

Q Do you know the purpose of that amendment?

MR. WAGGONER: Objection.

A As best I recall, this is a grammatical correction. I don't have House Bill 990 as it was approved by the House as amended by the Senate, but I believe this did not change the substance of the bill and was a grammatical correction.

Q Would you look at the second amendment on the same page?

A Yes.

Q What was the purpose of that amendment?

MR. WAGGONER: Objection.

A I can only give you the purpose as I understand it. These were put in by Senator Edwards of Guilford County and I couldn't testify as to what his purpose was. I can tell you what I think the amendment does.

MR. WAGGONER: Objection, move to strike.

Q Would you tell us what you think the amendment does?

MR. WAGGONER: Objection.

A Yes. It appears to me and as I recall it, the amendment is to cover the cases where you have a vocational school or a school for handicapped children, something of that nature, where you might have one in the entire community that this particular class of children would be assigned to and I believe that is why the Senator introduced this amendment.

MR. WAGGONER: Move to strike.

Q Now, you notice the last phrase in the amendment which reads "or for any other reason which the board of education in its sole discretion deems sufficient".

A Yes.

Q Would you tell us what you understand that provision to mean?

MR. WAGGONER: Objection.

A I understand it to mean just what it says. If the Board of Education in its discretion feels a transfer or reassignment is required that such would be allowed.

MR. WAGGONER: Move to strike.

Q And the statute would not apply in that instance?

A The statute would apply but it would not prohibit such actions.

MR. WAGGONER: Move to strike.

Q Would you consider this an absolute discretion of the School Board?

MR. WAGGONER: Objection.

A What I would consider it really, I think, is meaningless. It's what it says it is. My consideration of it would be a legal conclusion that I don't feel qualified to give.

Q Well, when you voted for the bill, what were your impressions at that time of the meaning of that provision?

MR. WAGGONER: Objection.

A My impression at that time was that it says just what it says right now, or for any other reason which the board of education in its sole discretion deems sufficient.

MR. WAGGONER: Move to strike.

Q Would this permit a Board in desegregating the schools to make assignments that considered race and to transport pupils in order to desegregate schools?

MR. WAGGONER: Objection.

A Would you read that question back, please?

(The Court Reporter reads the question on Page 10, Line 23.)

A I do not feel qualified to state a conclusion of law as to what this would or would not permit any Board of Education to do. This is a matter for the State or Federal Courts to determine and not for me to say.

Q We're trying to get something about the legislative history of the bill and we were interested in your impressions at that time what the meaning of the provision was. I understand that when the bill came back to the House you spoke in favor of the bill including the amendments. Would you give us your opinion, as you understood it at that time, whether this provision would permit a Board to desegregate the schools and to consider race in doing so?

MR. WAGGONER: Objection.

A In my opinion, and it's only my opinion, when the bill came back before the House it was not debated as to the amendments; that as the introducer of the bill I had one of two courses available. I could either move that we concur in the Senate amendment, in which event the bill would become ratified, or move that we do not concur in the Senate amendment, in which case a conference committee would be set up and the bill sent to the conference committee. I did move that the House concur in the Senate amendments. As best I recall, there was no debate on that motion and it passed unanimously. The opinion I had at the time that the bill came back to the Senate, the Board of Education would be allowed a great deal of latitude in assigning or reassigning students and giving them the sole discretion as to what would or would not be sufficient. It would appear to me there would be numerous instances where if the Board felt that such reassignment were required it would be allowed to do so.

MR. WAGGONER: Move to strike.

Q Would you look again at Plaintiff's Exhibit 2. The first news article there attempts to give the purpose of the bill, to preserve the neighborhood school concept, and it says also,

"Carson introduced the bill several weeks ago in the wake of a federal court ruling that ordered more integration of Charlotte-Mecklenburg schools." Would that be a correct statement?

MR. WAGGONER: Objection.

A I am not prepared to state whether or not a newspaper article from some paper not identified by some reporter that I do not know is correct or incorrect. I have testified as to the date that the bill was introduced. I said I had no reason to believe it was other than May 7th. I do not recall the date of any particular court ruling in Mecklenburg County and I think that the record will have to be considered to see whether it was before or after. As to the term "the wake of", I think that's meaningless. I think following or prior to would be a more accurate description.

Q The next paragraph reads: "At that time it was feared that students would have to be bused out of their districts to obey the court order." Would that be a correct statement of your consideration at the time that you introduced the bill?

MR. WAGGONER: Objection.

A My consideration as to what was "it was feared" would be nothing. I don't even know particularly what "it" means. Certainly the possibility of busing was foremost in my mind but as to whether or not this particular article is correct, I have no way of knowing.

MR. WAGGONER: Move to strike.

Q Was not this possibility suggested in the April 23 order of the Court in this case?

A I believe the possibility has been suggested on numerous occasions both before and after April or May and I think it had been coming or the possibility had been forthcoming for a long time, I'd say probably—I don't know—a year or so or more.

Q You do know there was quite some concern at that time in

Mecklenburg County about the order of the Court, the April 23 order.

A There has been a great deal of concern in Mecklenburg County throughout the matter both before and after April of '69.

Q And was it not foremost in your mind at the time you introduced the bill?

MR. WAGGONER: Objection.

A The concern of the people of Mecklenburg County and the State of North Carolina has always been foremost in my mind in introducing any bill.

MR. WAGGONER: Motion to strike.

Q Would you turn to the second page of Plaintiff's Exhibit 2. By the way, the first page is an article from the Charlotte News. The second page is an article from the Charlotte Observer.

A Yes, I'm referring to it now.

Q Is that a correct report of the House consideration on the date indicated?

MR. WAGGONER: Objection.

A I have no way of knowing to my personal knowledge whether it's a correct report of the House consideration or not.

Q Would you turn to the third page?

A Yes, I'm referring to the third page.

Q That is an article from the Charlotte Observer dated June 18, 1969. Would you look at that article?

A Yes, I'm referring to it.

Q Would you look at the last column on that page?

MR. WAGGONER: Let me get through the thing.

MR. CHAMBERS: OK.

A Yes, I have read the final column.

Q Are the quotations there correct?

A Which particular quotations are you referring to?

Q The first quotation is, "Carson replied that Charlotte-Mecklenburg's board was "very interested" in the bill and that he thought "others" would be."

A Yes, I'm confident that the Charlotte-Mecklenburg Board would be very interested in the bill and others would be, too.

Q Did you make the statement?

A I don't recall.

Q Would the second quotation there coming from Representative Fred Mills be correct?

MR. WAGGONER: Objection, hearsay.

A I don't recall.

Q Look down, the report shows a question asked you by Rep. Arthur H. Jones of Mecklenburg regarding any possible conflict between the bill and the decision of the Court should that become law. Would the quotation there coming from you be correct?

A Not completely, no. There could be a conflict or there could not be, depending on what the Local Board decided to do.

Q Do you recall whether you said: "Well, of course, I see a a conflict. If there were no conflict I don't think there would be any need for the bill."

MR. WAGGONER: Objection.

A I don't recall whether I said it or not. I don't deny it, I just don't recall it.

Q You might have said it?

A Yes.

Q You said that there might be . . .

MR. WAGGONER: Objection.

Q There might not be a conflict depending on what the Board decided to do.

A Yes.

MR. WAGGONER: Objection.

Q Will you explain that?

A I'll explain it as I think I do now because I don't have a recollection of what I thought at this particular moment. I think there would be a conflict if the Board were to decide to involuntarily bus students for the sole purpose of achieving a racial balance.

Q Even with the provision in the act that the Board could do anything within its discretion?

MR. WAGGONER: Objection.

A This again calls for a conclusion of law. I don't necessarily think there would be a conflict. There may be one. If the Board took the position that education in Mecklenburg County would suffer and the public school system would suffer but they still wanted to provide transportation for the sole purpose of achieving a racial balance, I don't think the Board would be allowed to do this.

MR. WAGGONER: Motion to strike.

Q Mr. Carson, would you tell us in your opinion your difference between achieving a racial balance and desegregating the schools?

MR. WAGGONER: Objection.

A I think achieving a racial balance would be much easier of the two to define. I think a racial balance in Mecklenburg County would be roughly 70-30 in each school within the county. As far as ending desegregation goes, this, of course, is a most difficult question that I am not competent to

answer and I don't know of anyone who is. The Court decisions have been, to me at least, very ambiguous as to what must be done to end segregation. Whether or not it means assigning all pupils without regard to race, creed, color or national origin or whether it goes further to mean that race, creed, color and national origin must be considered to achieve a mixture of race as far as practical, I just would not feel competent to answer that question.

MR. WAGGONER: Motion to strike.

Q Would you look at the next page, which is an article from the Charlotte Observer dated June 26, 1969.

A Yes, I am referring to that now.

Q Do you recall seeing this article in the paper?

A No, I don't recall seeing this article in the paper.

Q Were you in court in the hearing of this case in August of 1969 when the Court considered the Board's plan that was subsequently approved for the 1969-70 school year?

A I don't recall. I have been at the hearings on two or three occasions for relatively short period of time.

Q Are you familiar with the Board's plan for 1969-70 that provides for reassignment of Negro students from the inner-city schools to white schools?

A You mean the closing of the six or seven schools?

Q Yes.

A Yes, I am vaguely familiar with it. I have not read it myself but I have followed it in the newspapers and through the other media.

Q Are you familiar with the provision of the plan that provided for reassignment of Negro students from overcrowded Negro schools in the inner-city?

A I know that some schools had been closed in the inner-city.

I did not know some were overcrowded and portions of the pupils from the overcrowded schools were transferred out, no.

Q Are you familiar with the provision of the plan that provided transportation for the Negro students to attend the white schools?

A Yes.

Q Do you recall comments by counsel for the School Board at that time about the provision of the statute that authorized the Board to make a reassignment in its discretion?

MR. WAGGONER: Objection.

A I don't recall the comment.

Q Did you consider the reassignment of the Negro students for 1969 and the transportation being provided for them a violation of the bill?

MR. WAGGONER: I object. The witness stated he really hasn't read the plan and doesn't know what it did.

A No, I do not think it would be a violation of the bill. I think the overcrowded portions of it would be certainly within the discretion of the School Board and would be specifically covered by the act. As for the other part, as far as I know the reassignment and transportation was on a voluntary basis and the School Board allowed children who did not wish to be transported to the outer portions of the city to be reassigned to the school closest to their home. And certainly providing transportation for the pupils in the inner-city who wanted to be transported outside would not be prohibited by the bill.

Q That's the voluntary nature of the bill?

A Yes.

Q Now, the Bill prohibits involuntary transportation. Would you define or tell us what you meant by involuntary?

MR. WAGGONER: Objection.

A Yes. The involuntary would refer to the pupils and to their parents or guardians.

Q They would be the ones who would make the decision?

A Yes, as to whether or not they wanted to attend a school near their home or whether they wanted to be transported to another locality.

MR. WAGGONER: Motion to strike.

Q Would that present some conflict with the other provision of the bill that permitted the Board to assign students within its discretion?

A No, I don't think that would present any conflict.

Q If the Board decided to assign students and the students objected, would such assignments be in violation of the act?

MR. WAGGONER: Objection.

A That would depend on a great many circumstances and also would require a conclusion of law from me. I would have to say that under certain circumstances it might and under others it might not.

Q Would you define some of those circumstances that it might?

MR. WAGGONER: Objection.

A That it might be a possible conflict?

Q Yes.

A Yes. As I said, if the School Board decided that they were going to transport pupils merely to achieve a racial balance and that education of any of the students would not be improved but that the School Board felt they had to have such a balance anyway, I think that this would be a conflict.

MR. WAGGONER: Motion to strike.

Q Will you define some of the exceptions where it would not be a conflict?

MR. WAGGONER: Objection.

A Yes. I think if you had a school that was overcrowded or if you had a school that were damaged by fire and the Board felt that the pupils should be assigned to another school, either on a temporary or more than a temporary basis in the case of overcrowding, I think it clearly would not be, whether or not the pupils wanted to go.

MR. WAGGONER: Motion to strike.

Q Suppose you had a segregated school and the Board had to reassign in order to desegregate the school?

MR. WAGGONER: Objection.

A Well, this gets into another difficult question. When you say the Board had to reassign to desegregate, if the constitution requires such an assignment, of course not. If the constitution does not require such an assignment, yes, it would.

MR. WAGGONER: Motion to strike.

Q We discussed this bill previously, looking forward to securing an affidavit from you and you made a statement at that time that you considered the altering of school boundaries and the pairing of schools for the sole purpose of creating a racial balance to be in violation of the act, but the altering of school districts, the pairing of schools and other methods designed to eliminate the effects of past racial discrimination would not necessarily be.

MR. WAGGONER: Objection.

A Yes, that's correct.

MR. WAGGONER: Motion to strike. May I have a copy of the affidavit?

MR. CHAMBERS: It's not an affidavit.

MR. WAGGONER: Well, it's a document.

MR. CHAMBERS: You may.

Q You also stated at that time that you considered the determination of involuntary to be that of the school children and their parents.

A Yes.

MR. WAGGONER: Objection.

Q You also stated at that time that the bill was amended in the Senate to vest the discretion in the Local Board to make alterations in the method of assigning pupils discretionary?

MR. WAGGONER: Objection.

A Yes.

MR. WAGGONER: Motion to strike.

A Within limits.

Q What limits?

MR. WAGGONER: Objection.

A Well, the ones that we have just mentioned.

Q You also made a statement at that time that you did not consider the discretion vested in the Board to be absolute but that some reason must be given, such as a finding that racial balance in the school would promote the educational program or that the constitution requires racial balance in the schools.

MR. WAGGONER: Objection.

A Yes.

Q Is that correct?

A Yes.

MR. WAGGONER: Motion to strike.

Q You made a statement at that time that you did not think that the act would cover the situation where a school was converted from certain grade levels to other grade levels and students residing near the school would be required to be

transported to other schools serving their grade levels except where the distance involved would be extensive and/or there would be other schools in between the schools to which the students were being transported.

MR. WAGGONER: Objection.

A Yes, that's correct. I don't think this particular act applies to that.

MR. WAGGONER: Motion to strike.

Q You also made a statement that in your opinion the act would limit the kinds of plan or approaches that a School Board might follow in seeking to create a racial balance.

MR. WAGGONER: Objection.

A Yes, that's right.

MR. WAGGONER: Motion to strike.

Q You stated that in your opinion a requirement that there be a racial balance of students in each school in the system which also requires transportation would be violative of the act.

MR. WAGGONER: Objection.

A Would you read that question back, please?

(The Court Reporters reads the question on Line 7 above.)

A Yes, that's correct.

Q You stated that in your opinion the pairing of schools or redrawing of attendance lines to achieve a racial balance whether or not transportation of students is required would be a violation of the act.

MR. WAGGONER: Objection.

A Yes, to achieve a racial balance.

MR. WAGGONER: Motion to strike.

A But not to create a unitary school system.

Q To create a unitary school system, then, even though transportation is provided, would not be a violation of the act?

MR. WAGGONER: Objection.

A Not necessarily, no.

MR. WAGGONER: Motion to strike.

Q The April 23 order of the Court authorized the School Board to consider many means for desegregation including transportation. In your opinion would this bill limit the kinds of considerations that a Board might employ to desegregate schools?

MR. WAGGONER: Objection on incompetence and to the forum.

A Not necessarily. Certainly some types of transportation would not be affected at all by the bill. For example, if the Board decided all inner-city students should be given an option of attending the perimeter schools if they desired and provided transportation for them, it certainly would not.

MR. WAGGONER: Motion to strike.

Q Would there be some limitations placed, however, on the methods that a Board might utilize in desegregating schools?

MR. WAGGONER: Objection.

A There would be some limits placed on it, yes.

MR. WAGGONER: Motion to strike.

Q Would you tell us what those limitations would be or some of them might be?

A Yes. An obvious limitation would be the transportation of students across town for the sole purpose of achieving a racial balance.

Q Are you familiar with the plan that was directed by the Court on February 5, 1970?

A Vaguely familiar with it, yes.

Q Would the bill prevent implementation of that plan?

MR. WAGGONER: Objection.

A I would want to know specifically what in the plan you would be talking about before I could answer that.

Q Would it prevent the clustering of schools and the transportation of pupils as the Court directed?

MR. WAGGONER: Objection.

A If it were for the sole purpose of achieving a racial balance, Yes, I think it would.

MR. WAGGONER: Motion to strike.

Q Well, as you presently understand the plan, you're familiar with the clustering of schools directed by the Court, are you not?

A Yes.

Q And the pairing and the transportation provisions also.

A Yes.

Q In your opinion does this bill prohibit the Board from implementing that plan?

MR. WAGGONER: Objection.

A Yes. In my opinion . . . well, the entire plan, yes, I do think it would prohibit it, certain portions of it.

MR. WAGGONER: Motion to strike.

Q Would those portions be the clustering of schools and the transportation of the pupils in the thirty-four schools involved?

MR. WAGGONER: Objection.

A Just so I know exactly what you're talking about, tell me what you mean by clustering of schools as opposed to pairing.

A I guess we're talking about the same thing in clustering and pairing. You're familiar that the order requires that thirty-four schools be paired, ten black and twenty-four white.

A Yes.

Q And provides that transportation be provided for students reassigned for the purpose of desegregating those schools.

A Yes.

Q Now, would the bill prohibit implementation of that order?

MR. WAGGONER: Objection.

A Yes, in my opinion it would to the extent that the order is written.

MR. WAGGONER: Motion to strike.

Q Now, the April 23 order includes the following: "Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Charlotte has followed the local pattern of residential development, including its de facto patterns of segregation. With a few significant exceptions, such as Olympic High School (about 1/3 black) and Randolph Road Junior High School (23% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99+ white); Beverly Woods (100% white); Bruns Avenue (99% + black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100% white); Albemarle Road Junior High (93% white)." Then the Court writes on about the distance people drive to work and to church and to football games and other affairs. Now, to desegregate these recently built schools would the act prohibit the Board from making assignments, assigning blacks to all white schools and whites to all black schools and providing transportation?

MR. WAGGONER: Objection.

A Now, specifically your question is whether or not, without considering all the figures you read out of which I have no personal knowledge but I assume to be correct, the Board would be prohibited from assigning children to achieve a racial balance, is that correct?

Q Well, if the schools were all white and the Board wanted to desegregate those schools by assigning some black kids to those schools and providing transportation, would the act prohibit the Board from doing this?

MR. WAGGONER: Objection.

A I would find that very difficult to answer. If you had a particular situation where, for instance, a particular school district were gerrymandered to include all the pupils of a certain race or to exclude pupils of a certain race, I would say clearly no, they could be redrawn and should be redrawn. But on the other hand, if you're going to transport pupils from one section of town to a distant section of town and at the same time have cross transportation for the sole purpose of achieving a racial balance, then I would say yes, that it would.

MR. WAGGONER: Motion to strike.

MR. CHAMBERS: I have nothing further.

BY MR. WAGGONER:

Q Mr. Carson, there were other sponsors of this bill with you, is this correct?

A That's correct.

Q Who were they?

A Rep. Johnson of Cabarrus County and Rep. Hegge of Davidson County.

Q You're not familiar with their intent insofar as the proposed bill is concerned, are you?

A Well, their intent, I would say, would be the same as mine

and the same as the other members of the General Assembly who gave it overwhelming approval.

Q How many members are there of the General Assembly?

A 170, 120 in the House and 50 in the Senate.

Q Are these gentlemen in a position to pass on the coverage of this bill with respect to the specific facts in Mecklenburg County?

A No. I would say very few would be very familiar with Mecklenburg County. They're from, of course, all across the State.

Q Do you know who proposed the amendments to the bill that you originally proposed?

A The Senate amendments?

Q Yes.

A Yes, I do. Senator Edwards of Guilford County.

Q Do you know his intent?

A Well, I think he thought it would make it a more workable and better bill if it were amended. One or two of the provisions were grammatical in nature.

MR. WAGGONER: I have nothing further.

MR. CHAMBERS: Thank you very much.

****

CERTIFICATE

I, Evelyn S. Berger, Notary Public/Reporter, do hereby certify that James H. Carson, Jr., was duly sworn by me prior to the taking of the foregoing deposition; that said deposition was taken and transcribed by me; and that the foregoing 30 pages constitute a true, complete and accurate transcript of the testimony of the said witness. I further certify that the persons were present as stated in the caption.

I further certify that I am not of counsel for, or in the em-

ployment of any of the parties to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto subscribed my name this 12th day of March, 1970.

Evelyn S. Berger
Notary Public in and for
County of Mecklenburg
State of North Carolina

GENERAL ASSEMBLY

AMENDMENT

Date ..... By: .....

COMMITTEE SUBSTITUTE OF

Amend S. B. ..... H. B. 990

Adopted June 24

(1) Page 1, Lines 14 and 15
by striking the balance of the sentence after the word "various" and re-writing it as follows: "races, creeds, colors or national origins from the community."

(2) Page 1, Line 18
by changing the period after the word "districts" to a semicolon, and adding the following: "provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its

sole discretion deems sufficient.

(3) Page 2, Line 8
by striking the words "not to any" and inserting in lieu thereof the following: "nor to any assignment or"

(4) Page 2, Line 10
between the word "require" and "reassignment" insert the words "assignment or"

(5) Page 2, Line 13
by removing the period and quotation marks after the word "pupil" and adding the following: "or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Signed EDWARDS

SESSION 1969

Introduced by:

Representatives Carson, J. Johnson, and Hege

COMMITTEE SUBSTITUTE TO H. B. 990

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter

115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various race, creed, color or national origin from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States of North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

GENERAL ASSEMBLY

AMENDMENT

Date 16 June '69 By: Carson

Amend S. B. ..... H. B. 990

By adding a new paragraph on page two; line 14, following the word "Article" to read as follows:

The provision of this Article shall not apply to a temporary assignment of pupils. A temporary assignment shall be one for less than the school year resulting from conditions which temporarily render a school unacceptable.

House adopted 6/16/69

Signed JAMES H. CARSON, JR.

NORTH CAROLINA

GENERAL ASSEMBLY

1969 SESSION

HOUSE BILL DRH 255

Sponsors:

Representative Carson, J. Johnson, Hege

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter

115 of the General Statutes to be codified as G.S. 115-183.1 and to read as follows:

"G.S. 115-183.1. *Pupil assignment within neighborhood; involuntary bussing prohibited.* Notwithstanding any provisions of this or other Chapters, no pupil shall be assigned to a school outside the district in which he resides except upon the application of his parent, guardian, or person standing in loco parentis as hereinbefore provided.

Pupils residing within a district where two or more schools are located shall be assigned to the school which is closest to their place of residence unless application to attend elsewhere is made by the parent, guardian, or person standing in loco parentis. Applications for assignments outside the pupils' school district or to a school further from the pupils' residence than another school within the district shall be determined by the city or county board as hereinbefore set forth.

The city or county board may, in its discretion and subject to provisions as hereinbefore set forth, provide transportation for pupils assigned either within or without the district. Provided, however, students shall not be bussed or transported outside their respective districts or to a school more distant from their residences than another school within the district except in cases where the parent, guardian, or person standing in loco parentis has requested such assignment as hereinbefore set forth. Public funds, whether from taxation or any other source, shall not be used to provide transportation for pupils assigned in contravention of this Article."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

HOUSE GETS BUSING BILL

RALEIGH—Rep. James H. Carson's bill to prohibit arbitrary busing of students to create racial balances in schools comes up for floor action today in the House.

The bill has been given a favorable report by the House Judiciary Committee.

Carson's bill seeks to preserve "neighborhood school" concept which means students will be assigned to schools nearest their homes.

Carson introduced the bill several weeks ago in the wake of a federal court ruling that ordered more integration of Charlotte-Mecklenburg schools.

At that time it was feared that students would have to be bused out of their districts to obey the court order.

Carson's bill prohibits the involuntary busing of students outside their school districts. But it does not prohibit busing students if they desire it.

ANTI-BUSING BILL GETS HOUSE OK

By JERRY ADAMS

Observer Raleigh Bureau

RALEIGH—Mecklenburg Rep. James H. Carson's bill that would prevent the busing of school children without parental consent passed its second reading in the N.C. House Monday night.

Rep. Henry E. Frye of Guilford County requested that the bill's final reading be delayed until today. Only one member need request that a bill not receive its second and third reading the same day.

The bill provides that a child must be assigned to the school

nearest his home unless parents consent to his assignment to another school.

Before explaining his bill, Carson added an amendment that would allow busing of a child "under temporary conditions" for less than a school year if, for instance, the originally assigned school burned down.

Carson has explained that the constitutionality of busing has never been tested in the courts, although the idea has been an emotional issue for years and has been suggested by the courts as one means of fostering desegregation.

The New York legislature has passed a similar law.

Frye, the only objector during brief debate over the bill, contended that the bill "doesn't give any discretion at all to the (local) board."

Frye suggested that if the Assembly wanted to express its wishes to local boards of education it would be better advised to pass a resolution—without the force of law. Frye also said that some districts in the state were not rigidly defined and that confusion could result from such a law.

'NO BUSING' BILL ROUSES CRITICS

By JERRY ADAMS

Observer Raleigh Bureau

RALEIGH—Opposition erupted in the House Tuesday to Mecklenburg Rep. James H. Carson's bill to prohibit involuntary busing of public school children.

The bill was detered from final passage and will be reconsidered today.

Opposition came from several quarters on the floor of the

House Tuesday although the bill was passed in its second reading Monday night after only Rep. Henry E. Frye of Guilford opposed it. Frye delayed the final vote until Tuesday when it looked Monday night as though the bill was headed for overwhelming approval by voice vote.

"Some people (the opposers) have had a chance to look at it," Frye said after Tuesday's session, during which he did not speak. "Things were going so well I thought I'd just stay out of it," he said.

The bill would prevent a school board from busing a child without his parents' approval to a school other than that nearest his home.

Busing is a crucial issue in school desegregation, although Carson argues that busing has never received a specific court test. Frye is the General Assembly's only Negro member.

Speaking of another local issue in desegregation, Carson said on the floor Tuesday that his bill "has nothing to do with the freedom-of-choice plan one way or another."

But Rep. Neill I. McFadyen of Hoke said the bill would be impossible to apply in areas where school attendance districts were not precisely drawn.

Saying that he had been chairman of his local school board, McFadyen continued:

"If we tell the boards at home exactly what to do, I don't see why we need these local boards."

Local boards "should have some right to have some freedom of choice," too, McFadyen said.

Rep. Ernest B. Messer of Haywood objected that "shifting population" in a city or county would require that local boards be able to use their own discretion about transferring pupils.

Carson hastily offered an amendment that would suspend

the law in a case where a school building were damaged or where overcrowding required "temporary" busing.

But Messer was still not satisfied.

"I think it is wrong and I think it will create some stumbling blocks throughout this state that we won't realize until we come up against them," Messer said.

Rep. Ike F. Andrews of Chatham asked if local boards "had requested for even approved this bill?"

Carson replied that Charlotte-Mecklenburg's board was "very interested" in the bill and that he thought "others" would be.

Rep. Fred M. Mills Jr. of Anson asked, "Mr. Carson, really don't you want this to apply to just Mecklenburg County?"

Mecklenburg's board is currently locked in a fight with the federal district court, which has offered busing as one solution to a de facto segregated situation that the court says must be resolved.

Mills also raised the question of a parent who might not "even admit" his child needed special education classes for which busing might be necessary.

And Rep. Arthur M. Jones of Mecklenburg asked Carson if he could "see any possible conflict with the bill—should it become law—and the current situation with the courts in Charlotte-Mecklenburg?"

Carson responded, "Well, of course, I see a conflict.

"If there were no conflict I don't think there would be any need for the bill."

Carson said the state attorney general's office had told him the bill was constitutional, "but could be applied unconstitutionally."

When Carson's attempts at amending the bill showed no

signs of mollifying critics, he asked that the bill be reconsidered today.

After the session, obviously delighted with his new-found support in opposition to the bill, Frye said that the bill runs counter to the "trend" of this General Assembly in giving more power to local government.

CARSON'S REWRITTEN ANTIBUSING BILL PASSES IN HOUSE VOICE VOTE

Observer Raleigh Bureau

RALEIGH—Mecklenburg Rep. James H. Carson's bill to prohibit busing of school children without parental consent won final approval in the House of Representatives Wednesday and now moves to the Senate.

The bill, which locks legal horns wtih a desegregation case in Charlotte-Mecklenburg, was passed in a form substantially rewritten from the original.

Rep. Henry E. Frye of Guilford, the General Assembly's only Negro and the member who first opposed the bill, was not present for the vote Wednesday.

Other House members who had questioned whether the bill restricted local school boards too much, also were silent, and the bill passed by an overwhelming voice vote.

The bill prohibits busing of children across attendance-district lines to establish racial "balances or ratios" in any school. The bill also prohibits the use of busing to segregate by race.

Drawn along the lines of a recently passed New York law, the bill conforms to guidelines established by the U.S. Department of Health, Education and Welfare, Carson said.

"In my opinion, the bill probably is constitutional, but it may not be," Carson said.

Federal Judge James B. MacMillan has suggested busing as a means of further desegregating Charlotte-Mecklenburg schools. The schools now are under court order to come up with a plan that will further desegregate, but are in the process of fighting that order in the courts.

Carson cited a Jaycee poll from Charlotte that showed 94.8 per cent of 1,033 persons answering to "favor neighborhood schools."

Black people and white people want neighborhood schools, Carson argued. He was the only one to speak on the bill.

"I don't know what the courts will do, but we can state that the policy of this state is against segregation.

"And it's against involuntary busing of students."

LAW FIRM PLANS TEST OF ANTIBUSING LAW

By NANCY DRACHEY

Observer Staff Writer

A Charlotte law firm said Wednesday it will seek a constitutionality test of the new antibusing law.

The antibusing law, sponsored by Mecklenburg Rep. James H. Carson, received final approval in the N.C. House Wednesday, the last day of the General Assembly session.

The new law prohibits busing for purposes of integration or segregation, requiring a school board to assign children to the school closest to their homes.

Adam Stein, a partner of civil rights lawyer Julius I. Chambers, said their firm would ask the U.S. District Court here to determine the new law's constitutionality.

Normally, the constitutionality of state laws is argued before a court of three federal judges.

Chambers and his firm have represented the Negro parents and teachers who brought the Charlotte-Mecklenburg school desegregation case before the federal court here.

The new law, titled "To Protect The Neighborhood School System," would virtually assure some all-Negro and all-white schools since neighborhoods are segregated.

School Board attorneys Brock Barkley and William J. Waggoner have said the law would have to be obeyed unless it was stricken down in federal court.

Barkley told board members he thought the law was unconstitutional and would be tossed out if tested in federal court.

The antibusing law was approved in the Senate on Tuesday after earlier approval in the House. The Senate tacked on a technical amendment which the House approved Wednesday.

CIVIL RIGHTS LAWYERS WILL TEST BUSING LAW

By KAY REIMLER

News Staff Writer

Charlotte civil rights attorneys plan to take the newly passed state law forbidding involuntary busing to court to try to have it declared unconstitutional.

The law, sponsored by Mecklenburg Rep. James H. Carson

Jr., prohibits busing of children to school to promote segregation or desegregation and requires the assignment of a child to the school nearest his home.

J. LeVonne Chambers, the attorney who brought the desegregation suit against the School Board, told The News today that his office will test the law in the court.

CHAMBERS said he has "no idea" when the case might come up.

The case, he said, will be heard before a panel of three federal judges, not necessarily from North Carolina, appointed by the chief judge of the U.S. Fourth Circuit Court.

That court is in recess until September, the attorney said, adding that he doesn't know if the three-judge panel could be appointed before September.

The law as it stands could have an effect on any desegregation plan the Charlotte-Mecklenburg School Board might devise.

School attorneys agree that the board must abide by the law until the measure is stricken down in court.

Chambers told The News that a number of similar state laws were struck down by the courts during the late 1950's and early 1960's because they obstructed the desegregation of schools.

If all school children in the Charlotte-Mecklenburg system attend the school closest to their homes, the system would retain a number of racially identifiable schools since many neighborhoods in the county are segregated.

ANTI-BUSING LAW TARGET OF MOTION

By VIVIAN MONTS

News Staff Writer

Civil rights attorneys here today asked the federal court to override a new state law prohibiting involuntary busing of children outside their school districts.

A motion filed this morning by Adam Stein, law partner of J. LeVonne Chambers requested an order by Judge James B. McMillan which would prohibit the Charlotte-Mecklenburg Board of Education from using the law.

The motion was filed in connection with a suit seeking total integration of local schools. The court ruled last spring that schools here must have more desegregation.

Judge McMillan has not yet ruled on the busing request, but has granted an attached request by the attorneys asking that the names of the N. C. State Board of Education and Dr. A. Craig Phillips, state superintendent of public instruction, be added to the list of defendants in the suit.

THE ORIGINAL defendant was the local school board. School Board members were added later as individual defendants in the suit.

The state law the civil rights attorneys are seeking to overturn provides that "involuntary busing of students . . . is prohibited, and public funds shall not be used for any such busing."

The attorneys claim the law, passed July 2, forbids the local school board from carrying out court orders to comply with the school desegregation requirements of the Constitution.

The papers filed this morning state that "this is so because compulsory (pupil) assignments and involuntary busing . . . are necessary devices" for complying with court orders for desegregation of local schools.

Judge McMillan has never required involuntary busing in the local school system but stated in an order April 23 that "there is no reason except emotion . . . why school buses cannot be used by the board to provide the flexibility and economy necessary to desegregate the schools."

The temporary order asked by Stein would be in effect pending a decision by a three-judge panel as to whether or not the state law is constitutional. The civil rights attorneys claim it is not.

The attorneys claim that if the local school board is not immediately stopped from using the state law, its members will fail to comply with Judge McMillan's orders for the desegregation of schools here.

The anti-busing law originated in Mecklenburg County. It was introduced first in the House of Representatives by Mecklenburg Republican Rep. James H. Carson Jr.

School administrators contacted by The News this morning disagreed somewhat with Lt. Stroud's statement on marijuana sales in the schools.

"I question buying on the junior high campus," said Steven D. Wallin, principal at Coulwood Junior High School. "I haven't seen any here or on any other junior high campus."

And Thelbert C. Wright, principal at West Mecklenburg High School, said that "If you can buy that stuff in the big schools, we certainly don't know anything about it."

North Mecklenburg's assistant principal, B. K. Hurd, reacted to Stroud's statement by saying that "he (Stroud) knows something we don't know. I wouldn't be surprised at their being able to get it, but to my knowledge as to it being on our school grounds and being sold, no."

The News was able to contact only a few high school administrators because of the vacation period.

'NO BUSING' LAW IS CHALLENGED IN COURT

By NANCY BRACHEY

Observer Staff Writer

Civil rights lawyers Tuesday challenged the constitutionality of the new N.C. law that prohibits involuntary busing of children for racial balance in the schools.

The law also prohibits assignment of school children outside their attendance district to achieve a racial balance.

Its purpose, motive and effect;" said the law firm of civil rights lawyer Julius L. Chambers, is to prevent school boards in the state from complying with federal court orders for desegregation in compliance with the U.S. Constitution.

The lawyers asked that the new law be sent to a three-judge federal court for a constitutionality test. Pending that decision, they asked U.S. District Judge James B. McMillan to grant an injunction preventing consideration, application, administration and enforcement of the new law.

Chambers' firm filed the complaint in connection with the Charlotte-Mecklenburg school desegregation case, which is before McMillan.

The civil rights lawyers contended that "involuntary busing and pupil assignment" prohibited by the law are "necessary devices" to carry out existing court orders here and elsewhere in N.C. and to comply with constitutional requirements.

They alleged that unless the court prevents it, the Charlotte-Mecklenburg School Board will use the law to sidestep McMillan's court orders of April 23 and June 2 for desegregation of local schools.

The board has until Aug. 4 to present its second try at a desegregation plan for schools and faculties. The first pupil desegregation plan was rejected by the judge June 20.

(McMillan has not told the school board it must transport

students. He has said that the school board may use any means to accomplish desegregation of Charlotte-Mecklenburg schools.)

A number of other school districts in N. C. are also under federal court orders to desegregate this fall and next.

Also Tuesday, the N. C. Board of Education and Dr. A. Craig Phillips, state superintendent of public instruction, were made defendants in the Charlotte-Mecklenbug school desegregation case.

This follows a ruling issued by U. S. District Judge Algernon Butler of Raleigh that education officials have a duty in school desegregation.

The State, however, has announced an objection to Butler's ruling, and says it will appeal any decision that makes the State responsible for school desegregation.

Butler's order said the State officers share with local units the burden to actively seek the desegregation of the public schools.

McMILLAN WILL IGNORE NEW ANTIBUSING LAW

By WARREN KING

Observer Staff Writer

A recently enacted N.C. "antibusing" law apparently has little effect on the Charlotte-Mecklenburg School Board's plan to desegregate local schools.

Federal Judge James B. McMillan said Tuesday that a temporary restraining order on the law, (which prohibits involuntary busing of school children), was not necessary in considering the school board's plan.

Civil rights lawyer Julius L. Chambers asked for the order during a three-hour U.S. District Court hearing Tuesday on the school board's new desegregation plan which included the busing of black students to predominately white schools.

The statute, passed this summer by the General Assembly, prohibits busing of a student against his will.

Mecklenburg School Supt. William Self testified he didn't believe the board was influenced by the law in drawing up the desegregation plan.

The plan turns primarily on the concept of voluntary busing and contains provisions for reassigning students who object to being bused.

Self said he felt the busing was proposed for the same reason seven black schools would be closed under the plan and their students bused to the white schools: "To afford better educational opportunities (for Negro students) and prevent overcrowding (schools that would not be closed under the plan)."

Mecklenburg Rep. James H. Carson Jr., author of the anti-busing law, said in an interview the board was "quite proper" in ignoring the statute. It was not intended to interfere with the board's desegregation efforts, he said.

The law itself contains numerous exceptions that would allow busing, including one nonspecific provision for pupils reassignment because of "other circumstances."

In explaining the school board's position in regard to the law, attorney Maurice Weinstein said during the hearing that the exceptions provided for in the statute "swallow" it.

Weinstein said the state attorney general's office had told him it would seek to further clarify the law in the near future and requested that no action be taken on it during Tuesday's hearing.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

JAMES E. SWANN, et al., Plaintiffs, v CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; NORTH CAROLINA STATE BOARD OF EDUCATION; DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction; HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Board of Education; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County, et al., Defendants	)	CIVIL ACTION NO. 1974

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On June 22, 1970, a final judgment was entered by the Three-Judge District Court in this cause. In the final judgment it was ordered, adjudged and decreed that a portion of Section 115-176.1 of the General Statutes of North Carolina, quoted in the judgment, was held to be unconstitutional, void and of no effect.

The Defendants, Honorable Robert W. Scott, Governor of the State of North Carolina; Honorable A. C. Davis, Controller of the State Department of Public Instruction; Honorable William K. McLean, Judge of the Superior Court of Mecklenburg County; the North Carolina State Board of Education, a public body corporate; and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina, do hereby give notice of appeal, and do hereby appeal, from such judg-

ment to the Supreme Court of the United States.

This appeal is taken, and this notice of appeal is entered, pursuant to the provisions of 28 USC1253, this 1st day of July, 1970.

ROBERT MORGAN
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General of
North Carolina

ANDREW A. VANORE, Jr.
Assistant Attorney General of
North Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

JAMES E. SWANN, et al.,
Plaintiffs
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLEY; COLEMAN W. KERRY, Jr.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,
Defendants
and
HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, Jr.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,
(Additional) Parties-Defendant.

CIVIL ACTION NO. 1974

BOND FOR COSTS ON APPEAL

We, the undersigned defendants in the above entitled cause, as principals, North Carolina State Board of Education, A. Craig Phillips, Superintendent of Public Instruction, Robert W. Scott, Governor of North Carolina, A. C. Davis, Controller of the State Board of Education, William K. McLean, Judge of the Superior Court, and Great American Insurance Co., AS Surety, do hereby undertake and agree and bind ourselves to the Clerk of the District Court of the United States for the Western District of North Carolina in the amount of Two Hundred Fifty ($250.00) Dollars, that in the event the defendants fail in their appeal to the Supreme Court of the United States, then we will pay to the aforesaid Clerk of Court such court costs up to the foregoing said amount, as may be assessed against the defendants herein by reason of this appeal.

This the 1st day of July, 1970.

The North Carolina State Board of Education

By:

Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina.

Robert W. Scott, Governor of the State of North Carolina.

A. C. Davis, Controller of the State Board of Education

William K. McLean, Judge of the Superior Court.

PRINCIPALS

SURETY

The foregoing bond is approved and accepted and filed, this the —— day of July, 1970.

Clerk of the District Court of the
United States for the Western
District of North Carolina.

No. 498

Vide No. 444 for memorandum for U.S. as amicus curiae.

FILE COPY

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

—v.—

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

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IN THE

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OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

—v.—

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

Opinions Below

The opinion of the three-judge district court is reported as *Swann* v. *Charlotte-Mecklenburg Board of Education* (also *Moore* v. *Charlotte-Mecklenburg Board of Education*), 312 F. Supp. 503 (W.D. N.C. 1970).

Jurisdiction

Appellees submit that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case is not a "civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Appellees' argument in support of the contention that a three-judge court was not required appears *infra* in Argument III.

Questions Presented

1. Whether the judgment of the court below that a part of the North Carolina anti-busing law is unconstitutional should be affirmed:

(a) on the ground that it violates the equal protection clause by interfering with school boards' affirmative duty under *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), to eliminate dual school systems;

(b) on the ground that it effects a racial classification which violates the principles stated in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967);

(c) on the ground that it violates the Supremacy Clause by seeking to overturn the desegregation decisions of the federal courts and in particular the decisions of the federal district court in the Charlotte-Mecklenburg case.

2. Whether the court below properly (a) denied motions to dismiss various defendants and (b) restrained parties from seeking to enforce the anti-busing law by state court injunction proceedings.

3. Whether the appeal should be dismissed on the ground that no direct appeal is permitted inasmuch as the statute involved was so clearly unconstitutional that no three-judge court was required under the doctrine of *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Statement

Introduction

This case is here on direct appeal to review a judgment of a three-judge district court which held that a portion of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, was unconstitutional because it interfered with the affirmative duty of local school boards under the Fourteenth Amendment to desegregate racially segregated public schools and also violated the Supremacy Clause of Article VI. The court enjoined all parties "from enforcing, or seeking the enforcement of" the unconstitutional portion of the statute. The proceeding in the three-judge court was an ancillary proceeding connected with the school desegregation case involving Charlotte-Mecklenburg which is also now pending here as *Swann* v. *Charlotte-Mecklenburg Board of Education*, O.T. 1970, No. 281, certiorari granted June 29, 1970.

This appeal was taken by the North Carolina State Board of Education and four state officials.[1] The Charlotte-Mecklenburg Board of Education also filed a notice of appeal from the same order, but has not filed a jurisdictional statement or docketed its own appeal. Instead, the local school board has filed a motion in this Court to join in the appeal of the state board of education, pursuant to this Court's Rule 46.

---

[1] Appellants herein include the State Superintendent of Public Instruction, the Governor of North Carolina, the Controller of the State Board of Education, and a judge of the Superior Court of Mecklenburg County who issued an order allegedly interfering with the federal court desegregation orders. No notice of appeal was filed on behalf of the additional parties defendant Tom B. Harris, et al., the plaintiffs in the state court proceeding of *Harris* v. *Self;* nor was notice of appeal filed on behalf of James C. Carson, although the state argues in its brief that it is prosecuting the appeal on his behalf (Brief of the Attorney General of North Carolina, pp. 10-12. As to the notice of appeal, however, see A. 107-108.)

Another appeal from the same judgment is also pending here as No. 444, O.T. 1970, *sub nom. Moore* v. *Charlotte-Mecklenburg Board of Education.* The *Moore* case was consolidated for hearing with the instant case in the three-judge district court. It began as a suit in a state court by parents seeking to enjoin the Charlotte-Mecklenburg Board of Education from carrying out the desegregation orders issued by the federal district court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 281, O.T. 1970, cert. granted June 29, 1970. The Negro plaintiffs in the *Swann* case were not named as parties in the *Moore* case; only the school board is named as a defendant below and an appellee in this Court. The school board removed the *Moore* case to the United States District Court, but both below and here has agreed with and supported the argument of the plaintiffs-appellants Moore, et al. that the North Carolina anti-bussing law is valid. The Negro plaintiffs Swann, et al. moved in the district court for an order adding the plaintiffs in the *Moore* case as parties-defendants and enjoining them from interfering with the district court's desegregation orders. The order issued below, as noted above, enjoins all parties in both cases, including *Moore, et al.,* from enforcing or seeking enforcement of the unconstitutional portion of the anti-bussing statute.

Proceedings during 1969-70 before a Single District Judge

The school desegregation case brought by Negro pupils and parents against the Charlotte-Mecklenburg Board of Education was commenced in 1965 and there has been extensive litigation ever since which has culminated in the *Swann* case now pending in this Court. A full statement of the history of the proceedings from 1965 to date is contained in Petitioners' Brief in *Swann,* No. 281, O.T.

1970.[2] The case has resulted in numerous reported decisions which are cited in the note below.[3]

On April 23, 1969, after a plenary hearing, the district judge rendered a decision and order finding that the school system was still unlawfully segregated and directing that defendants file a plan for complete desegregation of the system (*Swann, supra,* 300 F. Supp. 1358; App. No. 281, p. 285a-323a). The court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, transportation or bussing of students and any other method which would effectuate a racially unitary system (App. No. 281, p. 315a-316a). Extensive litigation ensued as the board submitted a series of proposals and the court rejected them as unsatisfactory to disestablish the segregated system (App. No. 281, pp. 448a-458a; 579a-592a, 698a-716a, 819a-839a). In the midst of this litigation about the remedy to implement the April 23 decision, the North Carolina legislature enacted the anti-bussing bill proposed by a member of the Mecklenburg delegation (A.63-93). The measure which was ratified July 2, 1969, included the following two sentences (later held unconstitutional):

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national

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[2] The parties in this case, No. 498, have stipulated that the record and printed appendix in No. 281, O.T. 1970 and No. 349, O.T. 1970 constitute and shall be used as a part of the record in this case. This is consistent with the view of the case taken by the court below. Citations to the Appendix in Nos. 281 and 444 are indicated. The appendix in this case is cited as "A. —".

[3] See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), *affirmed,* 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970).

> origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing (A.91).

Plaintiffs in the *Swann* case promptly obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the above-quoted portion of the anti-bussing law; they asked that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284 (App. No. 281, pp. 460a-479a). However, no three-judge court was convened at that time and the court took no action on the requests for relief because the school board thought that the anti-bussing law did not interfere with the school board's proposed plan to bus about 4,000 black children to white suburban schools (306 F. Supp. at 1295; App. No. 281, p. 585a).

After further hearings to consider the board's further proposals during the fall of 1969 and the operation of the interim plan (which involved bussing black children to formerly white schools), the district court finally directed that a plan be prepared by the court's expert consultant (App. No. 281, p. 698a-717a). The court consultant's plan was ordered into effect in an order entered February 5, 1970, reported at 311 F. Supp. 265 (App. No. 281, 819a-839a). The February 5 order provides for the alteration of some school attendance areas, the creation of certain "satellite" or non-contiguous zones from which pupils would be transported to school, the pairing and clustering of certain schools with the alteration of grade structures, and transportation for pupils who live more than walking distance (as determined by the board) from the school to which they are assigned. The pairing and clustering of 10 black

and 24 white elementary schools will result in pupils of both races being transported to schools which were formerly segregated. The district court made extensive supplemental findings about the amount of transportation required and its relation to the large school bus transportation system which was already in operation in the community (App. No. 281, p. 1198a-1220a).

Obstruction of the District Court Orders; Convening of Three-Judge Court

Following the order of February 5, 1970, numerous citizens, under the banner of "Concerned Parents Association," held meetings to protest the order, vowing to defy, delay, obstruct and in any way prevent its implementation. On January 30, 1970, they filed a proceeding in the Mecklenburg County Superior Court (*Harris* v. *Self*) and obtained an *ex parte* temporary restraining order, purportedly preventing the superintendent from paying the fees and expenses of the court consultant as directed on December 2, 1969. (Appendix A, *infra* 6a). They filed an amended complaint on February 12, 1970, in the Mecklenburg County Superior Court and obtained an amended temporary restraining order which enjoined the Charlotte-Mecklenburg Board of Education from expending any money for the purpose of purchasing or renting any motor vehicle or operating or maintaining such for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg school system from one school to another and from one district to another (Appendix A, *infra* 19a). The order entered by the Mecklenburg Superior Court on January 30, 1970, was modified to permit payment of the court consultant on approval of the Board of Education (Appendix A, *infra,* 21a).

On February 11, 1970, Governor Robert W. Scott issued a public statement to the effect that North Carolina General

Statute §115-176.1 prohibited the involuntary bussing of students, that he had taken an oath to uphold the laws of the State of North Carolina, and that he was directing all officials to enforce this statute (Appendix A, *infra* 23a). On February 12, 1970, Governor Scott instructed the Director of the Department of Administration that "use of public funds for providing bus transportation shall be strictly in accordance with the appropriations made by the 1969 General Assembly, and for no other purpose. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins" (sic.) (Appendix A, *infra* 26a). Copies of the letter were forwarded to Dr. A. Craig Phillips, the Superintendent of Public Instruction; Dr. Dallas Herring, Chairman of the State Board of Education; Mr. A. C. Davis, the Controller of the State Board of Education; and Mr. Tom White, Chairman of the State Advisory Budget Commission. Shortly thereafter, Dr. A. Craig Phillips issued a similar statement and further advised that he was opposed to bussing (Appendix A, *infra* 27a). On February 23, 1970, he wrote to Dr. William S. Self, Superintendent of the Charlotte-Mecklenburg Schools and advised, "No additional State funds will be allocated to the Charlotte-Mecklenburg Board of Education to provide bussing of students for the purpose of creating a balance or ratio of students in the schools." On the same date, Mr. A. C. Davis directed a memorandum to the superintendent of each local school system in the State advising that the General Assembly had appropriated funds for the operation of 9,510 buses during the 1969-70 school year and 9,635 buses during the 1970-71 school year. The memorandum advised that approximately 9,443 buses were presently in use and that, "The appropriation does not include funds for the transportation of thousands of additional students

and the operating costs of hundreds of additional buses which might be made necessary by the reorganization of schools. No additional State funds will be allocated to school administrative units to provide bussing of students for the purpose of creating a balance or ratio of students in schools."

On February 13, 1970, plaintiffs moved the court (A. 46-50; App. No. 281, p. 840a) to add as additional parties-defendant the Governor of the State; Mr. A. C. Davis, Controller of the State Board of Education; the Honorable William K. McLean, the Superior Court Judge who issued the temporary restraining order; each plaintiff in the Superior Court proceeding and their attorney. Plaintiffs also asked the court to add as additional parties-defendant the Honorable James Carson who initially proposed the statute here in question and who had made several public statements of his intention to file a proceeding in the state court to enjoin the school board from complying with the February 5, 1970, order of the court. Plaintiffs further sought to enjoin the enforcement of the state court restraining order as modified on February 12, 1970, and to enjoin the defendants from further interference with the implementation of the orders of the district court.

On February 20, 1970, the resident district judge entered an order reciting the various events and requesting that the Chief Judge of the Circuit designate a three-judge district court (A. 19-22; App. No. 281, p. 845a). A three-judge court was designated on February 24, 1970, and additional parties were added by order of February 25, 1970 (A. 17-18; App. No. 281, p. 901a).

Meanwhile, on Sunday night, February 22, 1970, approximately 50 adults on behalf of themselves and their children filed another proceeding (*Moore* v. *Charlotte-Mecklenburg Board of Education*) in the Mecklenburg County Superior

Court seeking to restrain desegregation of the Charlotte-Mecklenburg schools as directed by the district court. At 10:16 p.m. on that Sunday night, the Honorable Frank Snepp issued an *ex parte* temporary restraining order enjoining the Charlotte-Mecklenburg Board of Education and its Superintendent

> from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color. (App. No. 444, p. 19-20).

On Thursday, February 26, 1970, the board removed the *Moore* case to the United States District Court (App. No. 444, p. 21-22). At a special meeting of the board on Friday, February 27, 1970, the board chose to comply with the order of the state court rather than the orders of the federal district court. The Superintendent announced that all planning and activities then underway for implementation of the district court's order of February 5, 1970, were terminated (App. No. 444, p. 31 or App. No. 281, p. 925a). On the same date, plaintiffs moved the court to add the plaintiffs in the *Moore case*, their lawyers and the Honorable Frank Snepp as additional parties-defendant in this case. Plaintiffs further sought an order enjoining the enforcement of the state court order and enjoining any further efforts by all of the defendants from taking steps which would prevent or inhibit the implementation of the orders of the district court. Plaintiffs also sought an order finding all members of the Charlotte-Mecklenburg Board of Education and its Superintendent in contempt and imposing a fine or imprisonment for each day that the defen-

dants failed to comply with the court's orders. (App. No. 281, p. 814a-917a).

Judge McMillan on March 6, 1970, entered an order decreeing that the order by Superior Court Judge Snepp in the *Moore* case "is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970" (App. No. 281, pp. 925a-927a).[4] The three-judge court court eventually ruled in an opinion dated April 28, 1970, that the challenged portions of the anti-bussing law were unconstitutional in violation of the equal protection clause of the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution (312 F. Supp. 503, 510; A. 2; App. No. 281, p. 1305a). The initial opinion denied injunctive relief and granted only a declaratory judgment. However, this portion of the original opinion was withdrawn[5] and the court enjoined all of the parties in the *Swann* and *Moore* cases from "enforcing, or seeking the enforcement of" the unconstitutional portion of N.C. Gen. Stat. 115-176.1.

Although plaintiffs Swann, et al. originally sought a three-judge court, they subsequently urged upon the district court that it was empowered to act on the matter as a single judge and that a three-judge court was not required by 28 U.S.C. §2281 because of the doctrine of *Bailey*

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[4] Both the attorney general and the state court plaintiffs made repeated efforts to disqualify or recuse Judge McMillan from sitting on the three-judge panel. See App. No. 281, p. 1, docket entries Nos. 143, 146, 148, 149, 154. On March 9, 1970, Chief Judge Haynsworth of the Fourth Circuit denied the motions to disqualify. Docket entry 155.

[5] The three-judge court determined to grant an injunction rather than merely a declaratory judgment after taking note of this Court's decisions in *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), and *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

v. *Patterson*, 369 U.S. 31 (1962). The three-judge court rejected these arguments that a three-judge court was not required.[4] (312 F. Supp. 503, 507.)

Some Facts on Student Transportation

Student transportation has become an important, and indeed, an essential auxiliary service in today's education. Nationally, over 18 million students were transported daily to public schools during the 1969-70 school year. This represented approximately 40% of the total public school enrollment. NEA, National Commission on Safety Education, *1968-69 Statistics on Pupil Transportation*, 1970.

Approximately 55% or 610,760 students in North Carolina were transported during the past school year. Transportation was offered to all public school pupils who lived more than one and one half miles from the school to which they were assigned and who: (a) resided outside of the city limits; (b) resided outside the city limits as it existed prior to 1957; (c) resided within the city limits but who were assigned to a school outside the city limits or outside of the city limits as it existed prior to 1957; and (d) resided outside the city limits and were assigned to a school within the city limits. While local school units initially purchased school buses, operating costs and replacements of the buses were paid by the state.

Pursuant to state statutes, the North Carolina State Board of Education adopted rules and regulations to govern transportation of students. (Plaintiffs Exh. 71 for

[4] The court below said that it rejected "plaintiffs' attack upon our jurisdiction" (312 F. Supp. at 507). However, plaintiffs, by a brief filed in the trial court sought to make clear that their argument that a single judge might properly have disposed of the case was not a denial that the three-judge district court had *jurisdiction* over the matter, but rather that three judges were not required to decide the case under 28 U.S.C. §2281.

March 1970 hearing in original record). The State Superintendent of Public Instruction had to approve any additions to the bus fleet or replacements of old buses by local units. Local units were also permitted to contract transportation of students who qualify under state law with private transportation companies in lieu of purchasing and operating school buses.

On August 13, 1969, a three-judge court in *Sparrow* v. *Gill*, 304 F. Supp. 86 (W.D. N.C. 1969) held that the state statute which authorized transportation of city students who live in areas annexed by a city subsequent to 1957 discriminated against other city students who were denied transportation. The State Board then amended its regulations to authorize transportation of all public school children who live more than one and one-half miles from their school whether or not they reside within the city limits. This regulation has substantially increased the number of students transported in North Carolina.

Even prior to the *Sparrow* decision, the State Board of Education and State Superintendent made efforts to secure transportation for all students who resided more than one and one half miles from their school. Similar recommendations had been made by a study commission appointed by the Governor in 1968 (App. in No. 281, 1202a; Plaintiff's Ex. 13 at March 1970 hearing in original record).

The district court quoted the relevant state-wide data on transportation of students in its Supplemental Findings of March 21, 1970:

> "The average school bus transported 66 students each day during the 1968-69 school year; made 1.57 trips per day, 12.0 miles in length (one way); transported 48.5 students per bus trip, including, students who were transported from elementary to high school.

"During the 1968-69 school year:

610,760 pupils were transported to public schools by the State

54.9 percent of the total public school average daily attendance was transported

70.9 percent were elementary students

29.1 percent were high school students

3.5 students were loaded (average) each mile of bus travel

The total cost of school transportation was $14,293,272.80, including replacement of buses: The average cost, including the replacement of buses, was $1,541.05 per bus for the school year—181 days; $8.51 per bus per day; $23.40 per student for the school year; $.1292 per student per day; and $.2243 per bus mile of operation. (Emphasis added.)" (App. in No. 281, p. 1199a)

The Charlotte-Mecklenburg Board of Education transported approximately 23,600 students during the 1969-70 school year. An additional 5,000 students rode the public transportation system at reduced fares. To transport the 23,600 students the Charlotte-Mecklenburg Board of Education operated 280 buses; made an average of 1.8 trips per day per bus and carried an average of 83.2 students per bus daily. Each bus averaged 40.8 miles round trip per day and each trip took approximately one hour and 15 minutes one way.

The board also transported more than 700 kindergarten children, ages 4 and 5, from 7 to 30 miles one way each day. (Br. A16, A24.)[7]

[7] The district court opinion of August 3, 1970, reprinted as the Appendix to Petitioner's Brief in No. 281, is cited as "Br. A. —."

Transportation costs in the Charlotte Mecklenburg system have been relatively inexpensive, less than 1% of the annual operating budget. The average cost for transportation per pupil was $20.00 per year or 22 cents per day. As indicated above, this closely approximates the average per pupil cost on the state level.

Finding this extensive transportation and its relative economy, the district court saw no reason why transportation could not equally be afforded to students in order to desegregate the school system (App. in No. 281, 1198a-1209a; Br. A10-A26). The court noted that transportation had been extensively used in order to maintain and to perpetuate segregated schools (1200a). Through the 1964-65 school year, the Charlotte-Mecklenburg Board of Education maintained racially overlapping attendance zones in order to transport black students to black schools and white students to white schools (App. No. 281, p. 1011a). Even during the 1969-70 school year when overlapping bus routes had ostensibly been eliminated the school board had continued to arrange transportation in order to perpetuate segregated schools. Black schools had been conveniently located near black residential areas as walk-in schools. White schools had been located in outlying white areas necessitating transportation of students. Thus, of the 23,600 students transported during the 1969-70 school year, only 541 of these students were transported to black schools (App. No. 281, 1014a-1032a; 1203a- 1204a).

The district court further noted that in addition to transportation, school district zones had been controlled in order to preserve segregated schools. The court stated in its order of June 20, 1969:

> This issue was passed over in the previous opinion upon the belief which the court still entertains that the defendants, as a part of an overall desegregation

plan, will eliminate or correct all school zones which were created or exist to enclose black or white groups of pupils or whose population is controlled for purposes of segregation. However, it may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy (App. No. 281, 455a-456a).

See also Reply Brief of Petitioners and Cross Respondents, in Nos. 281 and 349, pp. 3-17.

The court found that transportation of students would be necessary in order to desegregate the schools under any plan that might be directed:

"Both Dr. Finger and the school board staff appeared to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose led in one fashion or another to that conclusion" (1208a).

The plan proposed by the Charlotte-Mecklenburg Board of Education would require transportation of an additional 5,000 students.

The court stated in its Memorandum Decision of August 3, 1970 that although additional transportation would be required under the plan directed by the court, comparable transportation would be required under the other plans, with the exception of the plan submitted by the board (Br. A23). The court found, however, that the board had the facilities and personnel to implement the plan directed without any additional capital outlay during the first school year.

> No capital outlay will be needed to operate buses for the 1970-71 school year. The state is ready and willing to lend the few buses the board may need; replacements can be bought after actual need has been determined under operating conditions (Br. A23).

As the court had previously noted, the only thing necessary for the board to implement the plan directed was the willingness of the members of the board to discharge their constitutional responsibilities to the black children in the school system (App. No. 281, 1219a-1220a).

Summary of Argument

I.

A portion of N.C. Gen. Stats. §115-176.1 was properly held to be in violation of the Equal Protection and Supremacy Clauses of the Constitution.

The act limits a school board's powers to effectuate desegregation of the schools in a manner which conflicts with the board's affirmative duty to eliminate a dual school system as declared in *Green* v. *County School Board of*

New Kent County, 391 U.S. 430 (1968). School boards have an affirmative duty to bring about unitary systems and to that end they may use a variety of techniques of desegregation. Remedial measures for desegregation may not be limited by an artificial concept of color-blindness which functions to enable racial discrimination to continue. *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Wanner* v. *County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); cf. with respect to jury discrimination Judge Brown's opinion in *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966, *en banc*).

The act violates the principles of *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), in that it effects an expressly racial classification which makes it more difficult for black citizens to achieve school integration, and its purpose and effect as revealed by its entire context is to encourage the maintenance of segregation. New York's similar law was invalidated on these grounds. *Lee* v. *Nyquist*, — F. Supp. — (W.D. N.Y., Civil-1970-9, Oct. 1, 1970) (three-judge court).

The court below also correctly concluded that the Act violates the Supremacy Clause by attempting to nullify federal court desegregation mandates. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960) (three-judge court), stay denied, *Louisiana* v. *United States*, 364 U.S. 500 (1960), affirmed, 365 U.S. 569 (1961); *United States* v. *Peters* (US) 5 Cranch 115, 136 (1809).

II.

The various state officials were properly named as additional defendants because the record shows that they in fact took actions which threatened to interfere with Judge McMillan's court ordered desegregation plan in the Charlotte-Mecklenburg school case.

The district court was empowered by 28 U.S.C. §2283 to stay state court proceedings to protect or effectuate its own judgments. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La. 1960) (three-judge court), affirmed, 365 U.S. 569; *Thomason* v. *Cooper*, 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair*, 328 F.2d 586 (5th Cir. 1962), (*en banc*).

The court below properly rejected appellants' arguments based on the Civil Rights Act of 1964 because that Act does not limit the powers of the courts to remedy unconstitutional racial segregation in the schools.

III.

The direct appeal should be dismissed because the three-judge court was not required by any Act of Congress. 28 U.S.C. §1253. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). The challenged portions of the anti-bussing act presented no substantial question and were plainly unconstitutional under this Court's *Green* decision, *supra*. No three-judge court was required under *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962). Implementation of the requirement that dual systems be dismantled at once is delayed by unnecessarily convening three-judge courts to rule on segregation laws.

ARGUMENT

I.

The Court Below Correctly Held That a Portion of N.C. Gen. Stat. § 115-176.1, Known as the Anti-Busing Law Is Unconstitutional and in Violation of the Equal Protection Clause and the Supremacy Clause of the Constitution of the United States.

A. *Introduction—The Provisions of the Statute.*

The North Carolina anti-busing law, N.C. Gen. Stat. §115-176.1 (Supp. 1969), was ratified and became effective July 2, 1969.[8] It was entitled "An Act to protect the neigh-

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[8] NORTH CAROLINA
GENERAL ASSEMBLY
1969 SESSION
RATIFIED BILL
CHAPTER 1274
HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or oper-

borhood school system and to prohibit the involuntary bussing of pupils outside the district in which they reside." Our supplemental complaint challenged the validity of only the last two sentences[9] in the second paragraph of the sec-

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ating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

House Bill 990

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. TAYLOR, JR.
H. P. Taylor, Jr.
President of the Senate.
PHILIP P. GODWIN
Philip P. Godwin
Speaker of the House of Representatives.

House Bill 990

[9] Supplemental Complaint, para. I (A. 23-24).

tion, and it is only these two sentences—quoted hereafter—which the three-judge court restrained and declared in violation of the Equal Protection and Supremacy Clauses:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The first paragraph of §115-176.1 prohibits the exclusion of persons from public schools on account of race, and prohibits the drawing of attendance districts for the purpose of segregating persons "of various races, creeds, colors or national origins from the community." The first sentence of paragraph two permits (but does not require) school authorities to assign pupils to schools by attendance zones and states that boards may assign pupils outside their zones to attend specialized schools "or for any other reasons which the board of education in its sole discretion deems sufficient." The next sentence—as quoted above—forbids the assignment of students "on account of race," etc. or "for the purpose of creating a balance or ratio of race, religion or national origins." This is followed by the ban on "involuntary bussing of students in contravention of" the act, and the use of public funds to support such bussing. The third paragraph excepts from the act temporary assignments due to the unsuitability of a school, or assignments necessitated by overcrowding of schools or—in broad terms—"other circumstances which, in the sole discretion of the School Board, require assignment or reassignment." The fourth paragraph permits assignments on the basis of parental or pupil request pursuant to a "freedom

of choice plan voluntarily adopted by the board of education."

As the opinion below states, both counsel for the appellees Swann, et al. and the Attorney General of North Carolina construed the statute in much the same way (A. 7-8). As decribed by Judge Craven:

> The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race.... [H]e recognizes of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice. (A. 8.)

Appellees believe that the act's prohibition against assignments compelling a student to attend a school "for the purpose of creating a balance or ratio of race . . ." forbids the use of a variety of desegregation techniques such as redesigning zones so as to promote desegregation, pairing schools or altering grade structures for the same end, closing or consolidating schools to aid integration, or controlling school sizes by new construction, expansions, or the use of portable classrooms, or location of school sites to affirmatively promote integrated school systems. The antibussing sentence forbids the use of existing transportation facilities to promote desegregation or the initiation or ex-

pansion of bus services for that end unless pupils volunteer to ride such "desegregation buses." The effect of the provision is to disable the board from changing assignment patterns of any objecting pupils who previously resided within walking distance (1½ miles) of their schools for the purpose of desegregating the school system.

The available materials indicating the legislative history[10] of the anti-bussing law confirms this understanding of the legislation.[11] The bill's sponsor, Mr. Carson, an attorney,[12] said the purpose of the bill was stated in its title: "to protect the neighborhood school system and to prohibit the involuntary busing of pupils outside the district in which they reside" (A. 67). He said that "involuntary" busing

[10] Copies of the bill as originally introduced in the North Carolina House of Representatives, and the amendments made in a house committee substitute and by the state senate are explained in the deposition of the bill's sponsor, State Rep. James H. Carson, Jr. who represents Mecklenburg County in the legislature (A. 64-88; various amendments and versions of the act appear at A. 89-93).

[11] The original proposal by Rep. Carson on May 7, 1969 (A. 69, 74), designated House Bill DRH 255, provided that no pupils be assigned outside their districts of residence except upon parental application; that pupils be assigned to the closest school to their homes in multi-school districts; that boards may provide transportation for pupils assigned within or without their districts in the boards' "discretion," but that pupils might not be bused outside their districts to a more distant school except by their parents' choice. The bill made no mention of race or color at all. The bill as passed by the House and sent to the Senate (H.B. 990) appears at A. 90-91. This version was a committee substitute more nearly approximating the finally enacted bill. The committee substitute contained the language held invalid by the court below—the second and third sentences in present paragraph two. The Senate amendments added (in addition to grammatical changes) the proviso about assigning pupils outside their zones to specialized schools (first sentence of paragraph two) and the reference to freedom of choice plans (end of paragraph four).

[12] Mr. Carson was added as a defendant in this case not because of his legislative role but because he threatened to file proceedings in state court to prevent implementation of the court-ordered desegregation plan (A. 47, 53).

refers to the decision of pupils and parents (A. 80); that the bill would prevent implementation of the Finger Plan ordered by Judge McMillan which required clustering and pairing of thirty-four elementary schools and the transportation of pupils (A. 85-86). The fact that the bill was intended by its sponsor to conflict with Judge McMillan's April 23, 1969, order in the *Swann* case is confirmed by the testimony of Mr. Carson:

> Q. Look down, the report shows a question asked you by Rep. Arthur H. Jones of Mecklenburg regarding any possible conflict between the bill and the decision of the Court should that become law. Would the quotation there coming from you be correct? A. Not completely, no. There could be a conflict or there could not be, depending on what the Local Board decided to do.
>
> Q. Do you recall whether you said: "Well, of course, I see a conflict. If there were no conflict I don't think there would be any need for the bill."
>
> Mr. Waggoner: Objection.
>
> A. I don't recall whether I said it or not. I don't deny it, I just don't recall it.
>
> Q. You might have said it? A. Yes.

The state court judges who applied §115-176.1 in the two cases brought suit against the Charlotte-Mecklenburg School board (Judge McLean in *Harris* v. *Self, supra,* and Judge Snepp in *Moore* v. *Charlotte-Mecklenburg Bd. of Ed., supra*) issued temporary injunctions applying the law to prevent implementation of the court-ordered Finger desegregation plan. The *Harris* v. *Self* order (*infra* 19a) enjoins the board from spending any funds "for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district." Thus the order

broadly purports to block any reorganization of the system to desegregate the schools which involves "involuntary bussing." The order makes no distinctions based on the distances involved, age of the pupils or any such factors. The *Moore* case order (issued *ex parte* on a Sunday night) broadly enjoins "any plan or program under which any children . . . are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed . . . school because of their race or color." (App. in No. 444, pp. 20-21.)

The school board upon being served with the *Moore* injunction, promptly determined without any inquiry of Judge McMillan to obey the state court order and directed the school staff to take no further steps to obey Judge McMillan's desegregation decree.[13] (App. No. 281, p. 925a; App. No. 444, p. 31.)

B. *The statute unconstitutionally interferes with the school board's affirmative duty to dismantle the dual system.*

The court below correctly concluded that the purpose and effect of section 115-176.1 was to prevent school boards in North Carolina from performing their affirmative constitutional duties to implement *Brown* v. *Board of Education*, 347 U.S. 483 (1954), (*Brown I*), *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). We believe that the court below was so plainly correct in applying this Court's decisions to invalidate the section that the case merits either summary affirmance or dismissal of the appeal.*

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[13] The school board in 1969 took the view that §115-176.1 did not affect their discretion to adopt a plan to close inner city black schools and bus the pupils to white schools. (*Swann*, *supra*, 306 F. Supp. at 1295; App. No. 281, p. 585a).

* See Motion to Affirm or Dismiss filed herein.

The *Green* case held—in language applicable to Charlotte—that boards "operating state compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (391 U.S. at 437-438). Boards are required by *Green* to eliminate racially identifiable segregated schools and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (379 U.S. at 442). The Attorney General of North Carolina, in defending the anti-busing law, directly challenges the holding in *Green* in his brief in this Court:

> There is no way, considering the relation of the number of blacks to the number of whites, to establish schools "in which there are no white schools and no Negro schools but just schools." (Appellants' Brief, p. 16.)

The Attorney General argues that §115-176.1 directs the "establishment of *reasonable attendance areas* and the preservation of the so-called 'neighborhood school . . . [with] transportation of pupils on a nonracial basis. . . ." (Appellants' Brief, p. 16; emphasis added). The statute attempts to limit the remedies available to a school board or a federal court to change the dual system to freedom of choice plans, voluntary busing plans, or some kind of geographic zoning (variously called—by the appellants and the court below—"neighborhood" zoning, "reasonable" zoning, "non-gerrymandered" zoning, or zoning to the school nearest pupil's homes).

The three-judge court concluded that notwithstanding the federal courts' deference to such an expression of state legislative policy in favor of "neighborhood schools", such

a policy could not override the duty imposed by *Brown* and *Green*. Where—as in Charlotte—a "neighborhood" assignment policy cannot dismantle the state-created dual school system and eliminate all-black schools, a law which compels a neighborhood plan is simply a segregation law. In Charlotte, where all-black schools in black neighborhoods have been created by the acts of the school board and other governmental agencies, a requirement of neighborhood schools is simply a requirement for black schools in direct disobedience of *Brown I*. School desegregation plans must be designed so that they will work to dismantle state-created dual systems of separate white and black schools. A "neighborhood" policy or law which preserves the pattern of separate black and white schools is in direct opposition to *Green* as the Attorney General's brief has substantially admitted in the passage quoted above. Similarly, the statutory prohibition against use of school transportation facilities to eliminate racial identifiability of schools is equally in conflict with *Green*.

The provision to prohibit busing to desegregate the schools—except where pupils submit voluntarily to busing —contravenes the mandate of *Green* that boards take "whatever steps might be necessary to convert to a unitary system" (*Green, supra*, 391 U.S. at 437-438). Judge McMillan found that the use of the transportation system was *necessary* in order to afford a desegregated education to black children in certain Charlotte neighborhoods. The state may not enact a law forbidding that which is necessary to be done to obey the mandate of *Brown I*. The content of the statute's ban on busing is sufficiently vague that it affords little guide to differentiating legal busing from illegal busing. The net effect is to leave the matter of busing to the discretion of school boards. But despite the normal area of school board discretion about such matters

the ultimate decision about whether facilities which are necessary to integrate the school will be used cannot be left as a matter of discretion. *Green* requires that the boards do whatever is necessary to dismantle the dual system of black schools and white schools and eliminate racially identifiable schools where black pupils are set apart.

Section 115-176.1 would prevent the use of a variety of assignment methods and techniques which are being widely used to desegregate school systems. The law threatens to interfere with such techniques as school closing and consolidations, rezoning methods and techniques (zones designed to promote integration, non-contiguous zones), grade structure changes, the use of pairing and clustering techniques, and the control of school sizes by use of portable classrooms, building sizes, and site location when these methods are used for the purpose of controlling the racial composition of school populations. The Fourth Circuit has decided in the Charlotte case that all such methods must be considered in evaluating the available alternatives to desegregate the schools. We believe that the court was correct in viewing these techniques as appropriate remedies consistent with the "practical flexibility" mandated by *Brown II* (349 U.S. 294, 300) (App. No. 281, p. 1274a). Section 115-176.1 seeks to deprive the boards and courts of the necessary flexibility to accomplish the needed reforms.

The North Carolina Attorney General complains that the court below fails to define the constitutional objective of a unitary school system. But neither the Attorney General's Brief nor the anti-busing law suggests any principle of law for deciding such matters except that school boards be left alone to decide for themselves how much desegregation to accomplish. The entire appeal for a "neighborhood school" system—which has never existed in the Charlotte-Mecklenburg system—is in reality an

appeal for the courts to let the school boards use their control and their discretion to define school attendance. The "neighborhood school system" is primarily a political slogan, and the appellants seek to have the matter of eliminating school segregation resolved in the political process by elected school boards. The constitutional rights of black children under the *Brown* decision may not, under our constitutional system of protection for the individual rights of minority group members, be left to depend upon whether segregationists can win school board elections.

A three-judge court in Alabama recently invalidated a statute which forbids assignment "for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races" etc. *Alabama* v. *United States*, —— F.Supp —— (S.D.Ala. Civil No. 5935-70-P, June 26, 1970) (reproduced *infra*, Appendix B). That statute which is similar in effect to §115-176.1 was rejected on the same grounds relied upon by the court below. The Alabama district court was of the unanimous opinion that the statute did not even present a substantial question as it was foreclosed by prior decisions of this Court.

C. *The Appellants' Argument Supporting the Statute Rests on a rejected view that there is no affirmative duty to desegregate the schools.*

The Attorney General of North Carolina relies on the idea that school authorities have no affirmative duty to bring about integration of segregated schools. He cites the doctrine of *Briggs* v. *Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955), a doctrine which has been thoroughly repudiated by this Court's decision in *Green*, *supra*, as well as by the Fourth and Fifth Circuits. See e.g. *Walker* v. *County School Board of Brunswick Cty.*, 413 F.2d 53, 54, note 2

(4th Cir. 1969); and *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 846, 862-866 (5th Cir. 1966), affirmed on rehearing en banc, 380 F.2d 385, 389 (5th Cir. 1967), cert. denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840 (1967). The *Green* case made it clear that school boards must take affirmative action to root out segregation and "disestablish" the segregated systems. It is the result—whether a plan actually works to integrate the schools—that determines the adequacy of a plan to satisfy the constitutional mandate.

The appellants seek to find support for the anti-busing law in the *Brown* case itself by arguing that *Brown* rests on the premise that schools must be run on a color-blind basis. They argue that the use of color-conscious techniques to bring about school integration offends not only the anti-bussing law, but the Fourteenth Amendment as well.[14]

The appellants' argument entirely ignores this Court's recent holding—which must be taken as a repudiation of the idea that remedies for discrimination must be color-blind—in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The case is not even cited in the Appellants' Brief.[15] The *Montgomery County* decision approved a district judge's use of specific numerical goals for faculty integration as a remedial technique necessary to accomplish the ultimate objective of eliminating the racial identifiability of faculties in a segregated system.

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[14] When a litigant sought to use the Constitution to nullify a law against employment discrimination Mr. Justice Frankfurter wrote that "To use the Fourteenth Amendment as a sword against such State power would stultify that amendment." *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 98 (1945) (concurring opinion). Mr. Justice Reed called the argument "A distortion of the policy manifested in that amendment." (326 U.S. at 94) That same idea applies to appellants' argument.

[15] Appellants do however attack the requirement of faculty integration. Appellants' Brief pp. 24-25.

That decision necessarily rests on the premise that a remedial technique which is color-conscious does not offend the equal protection clause when it is used to eliminate school segregation. The *Montgomery County* decision emphasized the practical problems of a district judge seeking to eliminate an entrenched system of segregation. That difficult task cannot be accomplished by self-induced blindness to the race of the people in a segregated system. The appellants' argument that race cannot be considered in integrating the schools has been rightly rejected in a host of school desegregation decisions in the lower federal courts.[16]

The appellants attempt to support their argument by analogy from jury discrimination cases (Appellants' Brief, pp. 23-24). Judge Brown's opinion in *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966; *en banc*), cert. denied 386 U.S. 975 (1967) deals with the precise problem. Holding that realism required a consideration of race in reforming a jury system which had previously excluded Negroes, Judge Brown wrote:

> "Although there is an apparent appeal to the ostensibly logical symmetry of a declaration forbidding race consideration in both exclusion and inclusion, it is both theoretically and actually unrealistic. Adhering to a formula which in words forbids conscious awareness of race in inclusion postpones, not advances, the day

[16] *Wanner* v. *County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 244 F. Supp. 971, 981 (W.D.Okla. 1965), *affirmed* 375 F.2d 158, 169-170 (10th Cir. 1967), *cert. denied* 387 U.S. 931 (1967); *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 876-877 (5th Cir. 1966), *affirmed on rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967); *Youngblood* v. *Board of Public Instruction of Bay County*, No. 29369 (5th Cir. July 24, 1970); *United States* v. *Board of Public Instruction of Polk County*, 395 F.2d 66 (5th Cir. 1968).

> when this terrible blight of racial discrimination is exterminated. The challenge is to assure constitutional equality now. This often means, as it did in this case, eradication of the evils of the past. That evil of racial exclusion cannot be ignored. It must be reckoned with in terms which permit, indeed assure, equality for the immediate future. The evil and the evil practices are not theoretical. They are realities. The law's response must therefore be realistic." (*Brooks* v. *Beto*, 366 F.2d 1, 24 (1966).)

The anti-busing act's pretended color-blindness is also designed to postpone, not advance the elimination of segregation. The assertion that it has a benign intent is entirely belied by its inevitable and intended consequence of disabling school boards from altering the segregated systems they have established throughout North Carolina.

D. *Additionally §115-176.1 is unconstitutional because it violates the principles stated in Hunter* v. *Erickson*, 393 U.S. *385 (1969) and also the doctrine of Reitman v. Mulkey*, *387 U.S. 369 (1967).*

The judgment below invalidating a portion of section 115-176.1 may be affirmed on either of two added grounds not previously considered in the case—the doctrines of *Hunter* v. *Erickson, supra,* and *Reitman* v. *Mulkey, supra.* A sound opinion by Judge Hays for a three-judge district court has recently invalidated the New York anti-bussing law[17] on these grounds. *Lee* v. *Nyquist,* —— F.Supp.——,

[17] Section 3201(2) of the New York Education Law (McKinney 1970) enacted in 1969 was summarized by Judge Hays as a provision that "prohibits state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance". Elected boards continue to have such power. The law does not expressly mention busing.

(W.D.N.Y. Civil-1970-9, October 1, 1970) (three-judge court).

Hunter v. *Erickson, supra,* applies because the contested portions of § 115-176.1 make an "explicitly racial classification" by banning assignments of pupils, or involuntary busing "for the purpose of creating a balance or ratio of race, creed, color or national origin." This creates an invidious racial classification which denies equal protection of the laws. Under the statute school boards are permitted to assign pupils or involuntarily bus them for any reason except the purpose of creating a racial balance. Pupils might be assigned or involuntarily bused for any of a variety of reasons without violating the North Carolina law. Boards might without running afoul of the anti-bussing law bus pupils to segregate the sexes, to assign pupils by ability grouping or assign them homogeneously, to economize or achieve other advantages by consolidating small schools, to enable schools to be built on cheaper land far from residential areas or for many other reasons one might imagine. Pupils may be bused to attend picnics or sports events or concerts or for any of a variety of sightseeing outings considered part of the educational program. It is only busing to achieve racial integration which is effectively prohibited by §115-176.1. This classification treating assignments and busing involving racial criteria differently from other assignments and other busing makes it more difficult to deal with the question of racial integration in the schools. It constitutes an invidious discrimination against Negro citizens who have a right to have the segregated Negro schools designed to receive Negro children eliminated as racially identifiable institutions. There is no compelling justification for the statutory classification by race. It makes it more difficult for blacks to achieve a goal that is in their interest—racial integration of the schools.

Reitman v. *Mulkey*, 387 U.S. 369 (1967) applies because §115-176.1, serves to encourage maintenance of segregation throughout North Carolina. It is entirely obvious in the context of Judge McMillan's order to desegregate the Charlotte schools, and the entire history of sixteen years of failure to implement *Brown* in the Charlotte-Mecklenburg system and many others in the state, that the North Carolina anti-busing law was designed to preserve a degree of school segregation. The law's title includes a purpose to protect "neighborhood schools". It was enacted in direct response to a decision by Judge McMillan on April 23, 1969, that " 'Neighborhood' in Charlotte tends to be a group of homes generally similar in race and income." (App. No. 281, p. 305a), and that:

> "The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns." (App. No. 281, p. 312a).

No one who realistically views this case imagines that the anti-busing law was anything other than an effort to repudiate such holdings and establish a basis for retaining segregation. The effect of the discriminatory encouragement is obviously much stronger and more blatant in the Charlotte-Mecklenburg context than was the discriminatory encouragement found in California's Proposition Fourteen in *Reitman, supra*. See also *Lee* v. *Nyquist, supra*, and *Keyes* v. *School Dist. No. 1, Denver Colo.*, 313 F. Supp. 61 (D.Colo. 1970).

E. *The Court Below correctly Concluded that §115-176.1 also violates the Supremacy Clause of Article VI of the Constitution.*

The purpose and effect of the disputed portions of § 115-176.1 is quite manifestly an effort to prevent school boards from performing their obligations under the *Brown* decisions and overrule the mandates of the federal courts seeking to enforce the requirement of desegregation. Unhappily attempts by state legislatures to nullify *Brown* have not been infrequent, notwithstanding this Court's clear admonition in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958): "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

The doctrine of legislative interposition and nullification of desegregation decrees has no shred of legality. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *stay denied*, 364 U.S. 803, *judgment affirmed, Orleans Parish School Board* v. *Bush*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960; three-judge court), *stay denied, sub nom. Louisiana* v. *United States*, 364 U.S. 500 (1960), *judgment affirmed*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La. 1960; three-judge court), *judgment affirmed, New Orleans* v. *Bush*, 366 U.S. 212 (1961); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Legislature of Louisana* v. *United States*, 367 U.S. 907 (1961) and *Denny* v. *Bush*, 367 U.S. 908 (1961); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Tugwell* v. *Bush*, 367 U.S. 907 (1961) and *Gremillion* v. *United States*, 368 U.S. 11 (1961); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom.*

Wallace v. *United States*, 389 U.S. 215 (1967); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961; three-judge court), *judgment affirmed*, 368 U.S. 515 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967; three-judge court), *judgment affirmed*, 389 U.S. 571 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La. 1968; three-judge court), *judgment affirmed, sub nom. Louisiana Education Commission for Needy Children* v. *Poindexter*, 393 U.S. 17 (1968); *Louisiana Education Commission for Needy Children* v. *U. S. District Court*, 390 U.S. 939 (1968) (prohibition denied); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968; three-judge court), *judgment affirmed*, 393 U.S. 222 (1968).

The decisions of the district court in this case to require the further desegregation of the schools and to require the use of bussing and other techniques were of course not final until appropriate appeals were exhausted. But rather than resorting to appeals in due course, the state officials in North Carolina engaged in discreditable attempts to review and nullify the judgments of the district court by resort to state legislative, executive and judicial actions. These assertions of power were sought to be justified by arguments that decisions of the district court need not be obeyed and were not lawful until upheld by this Court. Such a premise must be emphatically rejected, as it was in the *Bush* case:

> From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another consequence of equal importance results. It is that the jurisdiction of the *lower* federal courts and the correctness of their decisions on constitutional questions cannot be reviewed

by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative constitutional tribunal, neither the executive, nor the legislature, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed. Assuredly, this is a great power, but a necessary one. See United States v. Peters, supra, 5 Cranch 135, 136, 9 U.S. 135, 136. (*Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 925 (E.D. La. 1960).)

Section 115-176.1 is all the more constitutionally vulnerable because it is also a legislative effort to deprive the black pupils who are plaintiffs in the Charlotte-Mecklenburg school case (appellees) of their rights under a specific judgment of the district court. This Court unanimously rejected such an assertion of state power to set aside a federal court decree in an historic opinion by Chief Justice John Marshall delivered on February 20, 1809, and such assertions have been emphatically rejected ever since. In *United States* v. *Peters*, (US) 5 Cranch 115, 136, (1809) it was stated:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting prin-

ciples so destructive of the Union, and in averting consequences so fatal to themselves.

The three-judge court which recently invalidated Alabama's so-called Freedom of Choice act reached the same conclusion we urge here in a similar context. See *Alabama* v. *United States*, —— F. Supp. —— (S.D.Ala. Civil No. 5935-70-P; June 26, 1970) (reprinted infra Appendix B). The Alabama law involved was very similar to the New York law discussed in part I.D. supra, except that it covered all school boards and not merely appointed boards. The Alabama court thought the North Carolina law was "analogous". That opinion also cites several other unreported orders by district judges who refused to permit such intervening legislation to impede desegregation orders. See e.g. *Bivins* v. *Bibb Co. Bd. of Ed.* (M.D.Ga. No. 1926, May 22, 1970); *Lee* v. *Macon Co. Bd. of Ed.*, M.D.Ala. Civ. No. 604-E, orders dated March 12, 1970 (Tuscumbia City), March 16, 1970 (Colbert County), March 23, 1970 (Monroe County).

II.

The Appellants' Other Objections to the Judgment Below Are Also Insubstantial.

A. *The motions to dismiss were properly denied.*

The Attorney General's arguments that the State Board of Education, the Superintendent of Public Instruction, the Governor[18] and other state officers were not properly named as defendants is plainly without merit. The argument rests on assertions that under state law these officials have no responsibility for operating local schools or school buses. But the undisputed facts of record, detailed in our Statement *supra*, indicate that these state officers did in fact threaten interference with the desegregation orders issued by Judge McMillan in reliance upon the anti-busing law. This amply justified adding them as additional defendants. Cf. *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), affirmed sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967) which is a state-wide school desegregation suit against state officials following the state officials' actual exercise of power over local desegregation efforts.

The state education officials in North Carolina have been held to share the affirmative duty to bring about the desegregation of schools with local officials. *Godwin* v. *Johnston County Board of Education*, 301 F. Supp. 339 (E.D.

[18] It does not matter that one of the state officers involved is the Governor of the State, for governors are in no different position than other state officials in terms of their duty to obey and not impede federal court judgments. *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932); *Faubus* v. *United States*, 254 F.2d 797 (8th Cir. 1958), *cert. den.* 358 U.S. 829; *Meredith* v. *Fair*, 328 F.2d 586 (5th Cir. 1962); *United States* v. *Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963); *Harvest* v. *Board of Public Instruction of Manatee County*, 312 F. Supp. 269 (M.D. Fla. 1970).

N.C. 1969); cf. *Bryant* v. *State Board of Assessment*, 293 F. Supp. 1379 (E.D. N.C. 1968; three-judge court). The record in this case contains extensive exhibits indicating the details of the control the state officials have over local school systems which might be used to aid or impede school desegregation. The entire school transportation system is basically dependent upon state financing and a state department of education refusal to pay operating costs for buses engaged in promoting desegregation would directly impede such a busing program.

B. *The District Court was empowered to stay State Court proceedings to protect or effectuate its judgments.*

No appeal has been filed on behalf of the state court plaintiffs in *Harris* v. *Self* or their attorneys from the judgment restraining them from seeking enforcement of the invalid parts of the anti-busing law. However the Attorney General has filed an appeal on behalf of Judge McLean one of the judges of the Superior Court who enjoined the school board from transporting pupils pursuant to the court-ordered desegregation plan.

The authority of the district court to protect its judgments adjudicating the constitutional rights[19] of citizens from being reviewed or obstructed by a state court is fundamental. As this Court made clear in *Cooper* v. *Aaron*, 358 U.S. 1, 17-19 (1968), it has been settled since *Marbury*

[19] This authority extends equally to the district court's decision (since affirmed by the Fourth Circuit) ordering the school board to pay the expenses and fees of the court's consultant Dr. John Finger. Judge McLean in *Harris* v. *Self* purported to enjoin the superintendent of schools from paying this fee without approval of the school board, which was withheld notwithstanding the fact that the Fourth Circuit decision on this question has not been stayed and no review of that decision has been sought here. See *In the Matter of Peterson*, 253 U.S. 300, 312 (1920). The issue is another manifestation of the board's recalcitrant attitude in the case.

v. *Madison* (US) 1 Cranch 137, 177 (1803) that the "federal judiciary is supreme in the exposition of the law of the Constitution."

The power of the federal district court to stay state court proceedings where necessary to "protect or effectuate its judgments" against threatened relitigation in state courts is conferred by 28 U.S.C. §2283. See 1A Moore's Federal Practice, 2319-2320, 2614-2616. Such orders restraining conflicting state court proceedings have been issued in a number of school desegregation cases. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *affirmed,* 365 U.S. 569 (1961) (both the litigants and state judge were enjoined in *Bush*); *Thomason* v. *Cooper,* 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962; *en banc*).

We take the point to be virtually conceded by appellants' brief which states with respect to Judge McLean: "The District Court's injunction as to him could be sustained as a protection of jurisdiction only, but, otherwise, Judge William K. McLean has nothing to do with the operation of schools and the busing of pupils." (Appellant's Brief, p. 11).

C. *The Civil Rights Act of 1964 does not support appellants' argument.*

Appellants sought below to support the anti-bussing law by the argument that the Congress had enacted a similar prohibition. The assertion cannot withstand close analysis. Congress did no such thing. But, the Court below simply held that the Civil Rights Act of 1964 could not be interpreted to frustrate the constitutional prohibition of segregated schools. This is exactly correct for as this Court has recently said "Congress may not authorize the states to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651, n. 10 (1966). The appellants' argument based

on the Civil Rights Act is essentially the same argument made by the Charlotte-Mecklenburg Board of Education. We have responded and showed that the federal courts have uniformly rejected the argument, and rightly so, in petitioners' Brief in No. 281, at pp. 65-66, and in petitioners' reply brief in Nos. 281 and 349, pp. 32-40. We adopt those arguments in this case.

III.

The Court Has No Jurisdiction of the Appeal Under the Doctrine of *Bailey v. Patterson*, 369 U.S. 31.

It is submitted that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case was not *required* by any Act of Congress to be heard by a three-judge district court. It is immaterial to this Court's jurisdiction that three judges actually sat if they were not required to sit. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

In *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962), this Court held that a three-judge court is not required "when prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." See also *Turner* v. *Memphis*, 369 U.S. 350, 353 (1962); *cf. Ex Parte Poresky*, 290 U.S. 30 (1933). We believe that these principles apply in this case because §115-176.1 is so plainly in conflict with *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). The three judge court which recently invalidated an analogous Alabama law reached the same conclusion that the unconstitutionality of the law was foreclosed by this Court's recent decisions. See *Alabama* v. *United States*, —— F. Supp. —— (S.D.Ala. Civil No. 5935-70-P, June 26, 1970 reproduced *infra appendix* B.

This Court's decisions in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S.

269 (1969), and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), require that dual school systems be desegregated *at once*. The mandate of *Alexander* requires that the lower federal courts dispose of cases involving school desegregation with dispatch. The unnecessary convening of three-judge courts to dispose of state laws seeking to prevent desegregation is not only wasteful of judicial resources but a cause of delay of substantive constitutional rights. Sixteen years after *Brown I* is far too long a period for there to be any doubt about the invalidity of laws such as §115-176.1 which have the plain purpose and effect of retaining racial segregation in the public schools.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, or, in the alternative, that the appeals should be dismissed.

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BRIEF APPENDIX A

Notification and Request for Designation of Three-Judge Court

(Filed February 20, 1970)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

Civil Action No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

—vs.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and, DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

—and—

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Several orders, starting April 23, 1969, have been entered by this court dealing with pending motions for

desegregation of the Charlotte-Mecklenburg schools. The orders of December 1 and December 2, 1969, and February 5, 1970, are attached as Exhibits A, B and C to this motion.

The December 2, 1969 order appointed Dr. John A. Finger, Jr. to assist the court in the preparation of a plan for the desegregation of the schools. The February 5, 1970 order directs the schools to be desegregated according to various principles described or referred to in the order, including the requirement erroneously advertised as "involuntary bussing to achieve racial balance" which reads as follows:

> "That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance."

A suit has been filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, No. 70-CVS-1097, entitled "Tom B. Harris, G. Don Roberson, et al., Plaintiffs, vs. William C. Self, Superintendent of Charlotte-Mecklenburg Schools, and Charlotte-Mecklenburg Board of Education, Defendants," and pursuant to allegations made in that action, Judge W. K. McLean, of the Superior Court of North Carolina, has entered an order temporarily restraining the School Board and the Superintendent from paying Dr. Finger's bills until they have been approved by the Board of Education, and ordering that "the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from ex-

pending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district."

The complaint, the amended complaint and the two orders of Judge McLean dated February 12, 1970, are attached hereto as Exhibit D.

The Governor of North Carolina has made a public statement, Exhibit E, and has written a letter to the Department of Administration, Exhibit F.

The State Superintendent of Public Instruction, a party to this case, has made a public statement, Exhibit G.

Reports received from the School Board on February 12, 1970 and February 19, 1970 fail to mention Judge McLean's order, and to indicate that the Board have appealed or intend to appeal Judge McLean's order; and these reports also reveal no action by the Board or school staff addressed to the transportation problem. It appears that whether the action of Judge McLean and the other state officials do or do not directly conflict with this court's orders, the practical effect of those actions is or may be to delay or defeat compliance with the orders of this United States Court.

The plaintiffs have filed a motion to make additional parties, and have requested this court to enter orders dissolving Judge McLean's restraining orders and directing the Governor, the State Department of Instruction and the "Concerned Parents Association" and their attorneys and others not to interfere further with the compliance of the School Board with the orders of this court.

Some of the issues raised by this situation may involve

the constitutionality of a state statute and others may be matters, cognizable by a single judge.

It appearing to the court that pursuant to Title 28, U.S.C.A., this matter should be heard and determined by a district court of three judges.

Now, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 19th day of February, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Exhibit A

(Opinion and Order of December 1, 1969)

(See Appendix in No. 281, p. 698a)

Exhibit B

(Opinion and Order of February 5, 1970)

(See Appendix in No. 281, p. 819a)

Exhibit C

(Order dated December 2, 1969)

(See Appendix in No. 281, p. 717a)

Exhibit D

(Complaint)

(Filed January 30, 1970)

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

70-CVS-1077

TOM B. HARRIS, G. DON ROBERSON, A. BREECE BRELAND, JAMES M. POSTELL, WILLIAM E. ROBIE, JR., CHALMERS R. CARR, and ROBERT T. WILSON,

Plaintiffs,

—VS.—

WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg County Schools,

—and—

JUANITA I. CADIEU, Treasurer of Mecklenburg County,

Defendants.

The plaintiffs, complaining of the defendants, allege and say:

1. That the plaintiffs, and each of them, are citizens, residents and taxpayers of Mecklenburg County, North Carolina, and the plaintiffs bring this action on behalf of all taxpayers of Mecklenburg County, North Carolina.

2. That the defendant, William C. Self, has heretofore been duly appointed as Superintendent of the Charlotte-

Mecklenburg Schools by the Charlotte-Mecklenburg Board of Education and is, and has at all times herein in question, been acting in said capacity.

3. That the defendant, Juanita I. Cadieu, is the duly elected and qualified Treasurer of Mecklenburg County, North Carolina, and is, and has at all times herein in question, been acting in said capacity.

4. That the plaintiffs are informed, believe and therefore allege that the Charlotte-Mecklenburg Board of Education did on or before June 15, 1969, present a request to the Mecklenburg County Board of Commissioners for funds to operate the public schools of Mecklenburg County, North Carolina, for the fiscal year 1969-1970, which request was in the form of a Budget setting forth specific items of expenditure, and all as required and provided by the North Carolina General Statutes.

5. That the plaintiffs are informed, believe and therefore allege that subsequent thereto, and on or before August 1, 1969, the Tax Levying Authority of Mecklenburg County, North Carolina, to wit, Mecklenburg County Board of Commissioners, did approve a Budget for specific items of expenditure, all as required and in accordance with the North Carolina General Statutes.

6. That the Tax Levying Authority, to wit, Mecklenburg County Board of Commissioners, did provide the public funds for the items of expenditure approved in the Budget, for the operation of the public schools of Mecklenburg County, North Carolina, for the fiscal year 1969-1970.

7. That the plaintiffs are informed, believe and therefore allege that on or about December 31, 1969, or shortly

thereafter, the defendant Superintendent, William C. Self, approved and signed a voucher authorizing payment of public funds to Professor John A. Finger, Jr. in the sum of $1,967.75, covering an alleged item of expenditure for a period from December 2, 1969 through December 31, 1969.

8. That the plaintiffs are informed, believe and therefore allege that the defendant Treasurer, Juanita I. Cadieu, did honor the voucher approved and signed by the defendant Superintendent, William C. Self, and did accordingly pay the sum of $1,967.75 from tax and other public funds to the said Professor John A. Finger, Jr.

9. That since the initial approval of the 1969-1970 Budget, the Charlotte-Mecklenburg Board of Education has made only one request to the Tax Levying Authority, which was about November, 1969, for an additional item of expenditure, over and above the approved Budget, which request was for compensatory education, which request was approved, and other than that one request, no necessity has been shown nor request made to the Tax Levying Authority to add items of expenditure which were not initially included in the said Budget.

10. That the said payment of $1,967.75 to Professor John A. Finger, Jr. was not for an item of expenditure included in the 1969-1970 Budget presented by the Charlotte-Mecklenburg Board of Education and approved by the Mecklenburg County Board of Commissioners, nor was it included in the one other additional item of expenditure requested and approved about November, 1969, for compensatory education.

Exhibit D—Complaint

11. That the act of the defendant Superintendent, William C. Self, in approving and signing a voucher authorizing payment of taxes and other public funds to Professor John A. Finger, Jr. was highly improper and illegal and in violation of the General Statutes of North Carolina and the Constitution of North Carolina.

12. That moreover and in addition thereto, the plaintiffs are informed, believe and therefore allege that the said Professor John A. Finger, Jr. has never been employed by the Charlotte-Mecklenburg Board of Education, that the Charlotte-Mecklenburg Board of Education has never entered into a contract with the said Professor John A. Finger, Jr. for the rendering of any services by him to the Charlotte-Mecklenburg Board of Education nor for the payment of any funds to him nor authorized or requested such, and the said Professor John A. Finger, Jr. has never rendered any public service to the Charlotte-Mecklenburg Board of Education nor to the citizens and taxpayers of Mecklenburg County, North Carolina, and such payment or further payments are tantamount to exclusive or separate emoluments or privileges from the community and in addition any voluntary acts on the part of Professor John A. Finger, Jr. were and are highly unnecessary to the operation of a public school system in Mecklenburg County, North Carolina, and all of which is highly improper and illegal and in direct violation of the North Carolina General Statutes and in violation of Section 7 of Article I, Section 23 of Article I, Section 38 of Article I, Section 6 of Article VII, Section 7 of Article VII, Section 5 of Article IX, and other provisions of the Constitution of North Carolina and the Constitution of the United States of America.

Exhibit D—Complaint

13. That the act of the defendant Treasurer, Juanita I. Cadieu, in honoring the aforesaid voucher approved and signed by the defendant Superintendent, William C. Self, is likewise unlawful for the reasons heretofore set forth.

14. That the plaintiffs are informed, believe and therefore allege that the defendant Superintendent, William C. Self, is imminently about to approve and sign another voucher or vouchers authorizing payment of tax or other public funds to the said Professor John A. Finger, Jr. for similar illegal items of expenditures, and unless the defendant Superintendent, together with the defendant Treasurer, are enjoined from making such payment or payments, the plaintiffs and all other taxpayers and citizens and residents of Mecklenburg County and State of North Carolina will be irreparably damaged.

15. That the plaintiff are informed, believe and therefore allege that the defendants are not solvent to the extent of being able to respond or make restitution with reference to the extent and amount of the aforesaid illegal payment that has been made and those that are about to be made and further that the recipient of said illegal payments is a non-resident of North Carolina and is not subject to the jurisdiction of the Courts of this State and that the plaintiffs do not have an adequate remedy at law and unless the defendants are restrained and enjoined from making further such illegal payments from tax and other public funds, which they are threatening to do and are imminently about to do, then the plaintiffs and all other similarly situated citizens, residents and taxpayers of Mecklenburg County, North Carolina, will suffer immediate and irreparable damage.

Exhibit D—Complaint

WHEREFORE, the plaintiffs respectfully pray the Court:

1. That a temporary restraining order and injunction be issued against the defendants, and each of them, and their agents and servants, enjoining and restraining them from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further restraining and enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina, pending the further orders of this Court;

2. That the defendants, and each of them, be directed and ordered to be and appear before a Judge of the Superior Court residing in or assigned to hold and preside over the Courts of the 26th Judicial District of North Carolina and show cause, if any they have, why the plaintiffs motion should not be allowed to the affect that a preliminary injuction be continued in effect, pending the final determination of this action.

3. That the Complaint be accepted and treated as an affidavit in this cause;

4. That the defendants, and each of them, be permanently enjoined and restrained from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina;

5. The plaintiffs demand a jury trial on all issues arising in this cause;

6. For such other and further relief as the plaintiffs may be entitled to in the premises.

/s/ WILLIAM H. BOOE
William H. Booe
Charlotte, North Carolina 28202
Attorney for the Plaintiffs

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

TOM B. HARRIS, G. DON ROBERSON, A. BREECE BERLAND, JAMES M. POSTELL, WILLIAM E. RORIE, JR., CHALMERS R. CARR, and ROBERT T. WILSON, first being duly sworn, depose and say:

That they are the plaintiffs in the above-entitled action and that they have read the foregoing COMPLAINT and know the contents thereof; that the same is true of their own knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things, they believe them to be true.

Exhibit D—Complaint

/s/ TOM B. HARRIS
Tom B. Harris

/s/ G. DON ROBERSON
G. Don Roberson

/s/ A. BREECE BRELAND
A. Breece Brelind

/s/ JAMES M. POSTELL
James M. Postell

/s/ WILLIAM E. RORIE, JR.
William E. Rorie, Jr.

/s/ CHALMERS R. CARR
Chalmers R. Carr

/s/ ROBERT T. WILSON
Robert T. Wilson

Sworn to and subscribed before me
this 29th day of January, 1970.
(Illegible)
Notary Public

My Commission Expires: 4-13-71

(Amended Complaint)

(Filed February 12, 1970)

The Plaintiffs, complaining of the defendants, for a first cause of action, allege and say:

That Paragraphs 1 through 15 inclusive, as alleged and set forth in this complaint filed herein are reasserted and alleged and incorporated herein by reference as fully and completely as though expressly set forth herein.

THE PLAINTIFFS, COMPLAINING OF THE DEFENDANTS, FOR A SECOND CAUSE OF ACTION, ALLEGE AND SAY:

1. That the plaintiffs, and each of them, are citizens, residents and taxpayers of Mecklenburg County, North Carolina, and the plaintiffs bring this action on behalf of all taxpayers of Mecklenburg County, North Carolina.

2. That the defendant, Charlotte-Mecklenburg Board of Education is a body corporate, and located in Mecklenburg County, North Carolina.

3. That the plaintiffs are informed, believe and therefore allege that the defendant Board is about to expend large sums of money from tax and other public funds for the purpose of purchasing buses and other such motor vehicles and for renting such vehicles and for the maintenance, upkeep and operation of such vehicles for the purpose of involuntarily transporting pupils and students in the Charlotte-Mecklenburg School system for the purpose of ultimately creating a racial balance in the Charlotte-Mecklenburg School system.

4. That the General Assembly of North Carolina has heretofore duly enacted Section 176.1 of Article 21, Chapter 115 of the General Statutes of North Carolina which is

presently in effect and in part expressly provides: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."

5. That no funds have heretofore been appropriated by the tax levying authority for such purposes and in addition thereto the aforesaid acts on the part of the defendant Board are in direct violation of North Carolina General Statutes 115-176.1 and are unlawful.

6. That the plaintiffs are informed, believe and therefore allege that the defendant Board is imminently about to proceed with the expenditure of said funds for the purposes heretofore set forth and unless said defendant is enjoined therefrom the plaintiffs and all other taxpayers and citizens and residents of Mecklenburg County and State of North Carolina will be irreparably damaged.

7. That the plaintiffs are informed, believe and therefore allege that the defendant Board is not solvent to the extent of being able to respond or make restitution with reference to the extent and amount of the aforesaid illegal expenditures that are about to be made and that the plaintiffs do not have an adequate remedy at law and unless the defendant is restrained and enjoined from making such illegal expenditures from tax and other public funds, which the defendant is threatening to do and is imminently about to do, then the plaintiffs and all other similarly situated citizens, residents and taxpayers of Mecklenburg County, North Carolina, will suffer immediate and irreparable damage.

Exhibit D—Amended Complaint

WHEREFORE, the plaintiffs respectfully pray the Court:

1. That a temporary restraining order and injunction be issued against the defendants, and each of them, and their agents and servants, enjoining and restraining them from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further restraining and enjoining them from making any payments to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina, pending the further orders of this Court;

2. That the defendants, and each of them, be directed and ordered to be and appear before a Judge of the Superior Court residing in or assigned to hold and preside over the Courts of the 26th Judicial District of North Carolina and show cause, if any they have, why the plaintiffs motion should not be allowed to the affect that a preliminary injunction be continued in effect, pending the final determination of this action;

3. That the defendant, and each of them, be permanently enjoined and restrained from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina;

4. That a temporary restraining order and injunction be issued against the defendant Charlotte-Mecklenburg School Board, its agents and servants, enjoining and restraining them from expending any money from tax or other

public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district.

5. That the defendant Board be directed and ordered to be and appear before a Judge residing in or assigned to hold the Courts of the 26th Judicial District of North Carolina and show cause why a preliminary injunction should not be continued in effect, pending the final determination of this action;

6. That the defendant Board, its agents and servants be permanently enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district;

7. That the amended complaint be accepted and treated as an affidavit in this cause;

8. The plaintiffs demand a jury trial on all issues arising in this cause;

9. For such other and further relief as the plaintiffs may be entitled to in the premises.

/s/ William H. Booe
510-14 Law Building
Charlotte, North Carolina 28202
Attorney for the Plaintiffs

Exhibit D—Amended Complaint

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

TOM B. HARRIS, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action and that he has read the foregoing AMENDED COMPLAINT and knows the contents thereof; that the same is true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things, he believes them to be true.

/s/ TOM B. HARRIS
Tom B. Harris

Sworn to and subscribed before me
this 12th day of February, 1970.

(Illegible)
Notary Public
My Commission Expires: 4-13-71

(Order)

(Filed on February 12, 1970)

THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding over the February 9, 1970, Schedule "L" Term of Superior Court of Mecklenburg County, North Carolina, upon the application and motion of the plaintiff, Tom B. Harris, for a restraining order and the Court treating the Amended Complaint filed in this action as an affidavit and for the purpose of this order, the Court hereby finds the facts to be as alleged and set forth in the Amended Complaint and further finds the plaintiffs are entitled to a temporary restraining order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Tom B. Harris, execute and file with the Clerk an undertaking in the amount of $1,000.00 running to the defendant Board, conditioned as provided by law and upon the giving of such undertaking and approval by the Clerk, the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Charlotte-Mecklenburg Board of Education be and it hereby is directed and ordered to be and appear before the Judge assigned and presiding over the Civil Term of Superior Court of Mecklenburg County, North Carolina, Wednesday, the 4th day of March, 1970, at 2:00 o'clock

P.M., in the Mecklenburg County Court House, Charlotte, North Carolina, and show cause, if any it may have, why this restraining order and a preliminary injunction should not be continued in effect pending a final determination of this cause.

IT IS FURTHER ORDERED that the Sheriff of Mecklenburg County serve a copy of this Order on the defendant, Charlotte-Mecklenburg Board of Education, and make return as by law provided.

This 12th day of February, 1970.

/s/ WILLIAM K. MCLEAN
Judge Presiding

(Order)

(Filed on February 12, 1970)

THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding over the Schedule "D" Civil Term of the Superior Court of Mecklenburg County, North Carolina, upon an order, which appears of record, directing the defendant, William C. Self, Superintendent of Charlotte-Mecklenburg Schools, to be and appear and show cause, if any he might have, why the restraining order, heretofore entered in this cause, should not be continued in effect pending a final determination hereof; William H. Booe appearing for the plaintiffs and William J. Waggoner appearing for the defendant Superintendent;

AND from the evidence presented, and for the purpose of this order, the Court finds the facts to be as alleged to be in the complaint; the Court further finds that the item of expenditure in question to Professor John A. Finger, Jr. was not included in the 1969-70 Budget and has never been officially considered by the Charlotte-Mecklenburg Board of Education, and the Court further finds that the General Statutes of North Carolina contain a procedure for consideration by the Board of items of expenditure which arise subsequent to the adoption of the Budget.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant, William C. Self, Superintendent of Charlotte-Mecklenburg Schools, and his agents, servants and employees, be and they hereby are restrained and enjoined from approving and signing any voucher or order authorizing or making any payment of tax or other public funds to Professor John A. Finger, Jr., until such time as

the Charlotte-Mecklenburg Board of Education approves the same.

The Court retains jurisdiction of this matter pending a final determination hereof.

This, the 12th day of February, 1970.

/s/ W. K. McLean
Judge Presiding

Exhibit E

(Statement by Governor Scott)

From: Governor Bob Scott
State Capitol/Raleigh
829-3991

FOR IMMEDIATE RELEASE

It has been called to my attention that the last session of the General Assembly enacted GS 115-176.1, which clearly states and provides that no public funds shall be used for involuntary bussing to achieve racial balance in the public schools of North Carolina. The law states: "Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

I have taken an oath to uphold the laws of North Carolina, and until this statute is declared unconstitutional, I shall not authorize the expenditure of any funds for such involuntary bussing.

I have always been against the bussing of students. I think it is disruptive. It destroys the neighborhood school concept.

The irony of all this is that nobody wants bussing. Blacks don't want it; Whites don't want it; teachers don't want it; parents don't want it; students don't want it—nobody wants it. Everyone wants freedom of choice to attend their neighborhood school.

2/11/70

Exhibit E—Statement by Governor Scott

SESSIONS LAWS—1969

CHAPTER 1274

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. B. 990 CHAPTER 1274

AN ACT TO PROHIBIT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the

board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education or an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this 2nd day of July, 1969.

Exhibit F

(Letter by Governor Scott)

[SEAL]

STATE OF NORTH CAROLINA
GOVERNOR'S OFFICE
RALEIGH 27602

ROBERT W. SCOTT
GOVERNOR

February 12, 1970

Dr. W. L. Turner
Director
Department of Administration
Raleigh, North Carolina

Dear Dr. Turner:

Chapter 1274, Session Laws of 1969, created a new section of Chapter 115 of the General Statutes, GS 115-176.1, which provides in part: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of studens in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

No funds will be expended in violation of this Statute. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins.

Sincerely,

/s/ ROBERT W. SCOTT
Robert W. Scott

cc: Dr. Craig Phillips
Dr. Dallas Herring
Mr. A. C. Davis
Mr. Tom White

Exhibit G

(Statement by Mr. Craig Phillips)

This is the text of Dr. Craig Phillips' statement, handed out the same day:

"The governor has made an important statement today in clarifying his stand on the proposed 'involuntary bussing' of children in North Carolina schools, especially as currently ordered by the court for the Charlotte-Mecklenburg schools, to be initially effective April 1, 1970. I thoroughly concur with his conclusion that until G.S. 115-176.1, concerned with involuntary bussing and the use of public funds for such purpose, is declared unconstitutional he cannot authorize expenditure of funds for such involuntary bussing which might be undertaken in the future.

"To my knowledge, no such 'involuntary bussing' now exists in North Carolina. The mandate of the court in the Charlotte-Mecklenburg case and the subsequent protest response of many white and some black parents does indicate the possibility that an issue could arise on April 1, 1970 which would test the validity of the current North Carolina law on the matter.

"Most responsible educators are greatly concerned about the movement toward elimination of the community school as a recognizable educational institution. I firmly believe that the continuation of the community school concept is vital to the stability and effectiveness of our public school system in North Carolina, especially as it pertains to elementary children.

"I do not believe that the type of bussing of students as is being ordered in Charlotte-Mecklenburg is in the best interests of the youngsters directly involved, the Charlotte-Mecklenburg community or the State of North Carolina.

Exhibit G—Statement by Mr. Craig Phillips

"I do believe that North Carolina has made great progress toward the physical development statewide of unitary school systems (probably best defined most recently in the decision rendered by the Fifth District Court in its Georgia ruling) and we are ready to get on with the task of providing the kind of new, effective, educational programs so bady needed for all the boys and girls in the 152 school systems over the state.

"We must not defy the law. We can not hold to a long departed notion that "freedom of choice" alone will provide for unitary schools. We must find, within the framework of carefully considered legal structure, ways to forge ahead with a strong movement by citizens and professionals alike to reach levels of educational achievement not yet reached in North Carolina. The September 1970 establishment in all school systems of duly integrated faculties in a basic ratio of white and non-white in the community served; a constant, diligent effort on the part of everyone to find ways to achieve a reasonable balance of white and non-white youngsters in the school population (except by 'involuntary bussing' to achieve such mixing); strong, immediate community movement toward the eventual elimination of segregated housing, especially in urban areas and in a variety of planned activities geared toward closer regular communication between whites and non-whites leading to greater mutual understanding—all of these are necessary if we are to regain stability and assure quality in all our schools for all our children in North Carolina."

BRIEF APPENDIX B

Opinion and Order of Three-Judge District Court in *Alabama* v. *United States, et al.*, S.D. Ala., No. 5935-70-P, June 26, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

STATE OF ALABAMA, MACDONALD GALLION AS ATTORNEY GENERAL, STATE OF ALABAMA,

Plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES S. WHITE-SPUNNER, AS UNITED STATES DISTRICT ATTORNEY, OLLIE MAE DAVIS AS MOTHER AND NEXT FRIEND OF BETTY ANN DAVIS, AND JAMES ALLEN DAVIS, JERRIS LEONARD, AS CHIEF OF CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, AND ROBERT H. FINCH, AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, AND BIRDIE MAE DAVIS,

Defendants.

Before GEWIN, Circuit Judge, and THOMAS and PITTMAN, District Judges.

PER CURIAM:

A 1970 Special Session of the Alabama Legislature enacted a statute entitled, "An Act, To Prevent Discrimination on Account of Race, Creed or National Origin in Connection with the Education of the Children of the State of Alabama."[1] This Act was approved by the Governor of Alabama on March 4, 1970. In the present action the State

[1] The text of the statute is quoted *infra*.

of Alabama seeks a declaration that this enactment is constitutional. It also seeks to have this court modify prior judgments to conform to the strictures of this legislation, and to enjoin certain federal officers to conform their actions to its provisions.

The defendants in the present action are the parties plaintiff in *Davis* v. *Board of School Commissioners of Mobile County, Alabama,* S.D. Ala., Civil No. 3003-63, and certain officers of the United States. On 31 January 1970, this court entered an order in the *Davis* case requiring forthwith implementation of a desegregation plan for the Mobile schools. Following the adoption of the Act in question, the Board of School Commissioners by resolution instructed the school superintendent and staff to abide by the Act and to take no further steps in implementing the court-approved plan. The plaintiffs in the *Davis* case then sought leave to add the Governor and Attorney General of Alabama as parties defendant and to amend their complaint to seek a declaration that the subject Act is unconstitutional and an injunction against compliance with it.

Following a hearing, this court denied the plaintiff's motion. In his order Judge Thomas, discussing the subject Act, stated:

> In 1809, Chief Justice Marshall said: "If the legislators of the several states may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."
>
> The School Board is required to follow the order of this Court of January 31, 1970, as amended, and if the

same is not followed within three days from this date, a fine of $1,000 per day is hereby assessed for each such day, against each member of the Board of School Commissioners.

The plaintiffs in this case, on the 10th day of May 1970, filed a petition requesting this Court to declare the Freedom of Choice Act of the Legislature of the State of Alabama unconstitutional. This case is not the proper vehicle in which to test the constitutionality of said Act. The said petition is therefore dismissed.

The State of Alabama through its Attorney General then instituted the present action joining as defendants the plaintiffs in the *Davis* case, the Chief of the Civil Rights Division of the Justice Department, Charles S. White-Spunner, as United States District Attorney, and the Secretary of Health, Education and Welfare. The present three-judge court was constituted by the Chief Judge of this circuit pursuant to the request of Judge Pittman, before whom this action was originally filed. In his order designating the panel, the Chief Judge states:

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the Three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both.

Brief Appendix B
Opinion and Order of Three-Judge District Court

In *California Water Service Co.* v. *Redding*,[2] the Supreme Court observed that the statutory requirement of a three-judge court is not applicable unless the constitutional claim regarding a state statute or administrative order is substantial. The Court then stated: "It is therefore the duty of a district judge, to whom an application is made for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented. . . ."[3] While "[t]heoretically, this solo travail should be the indispensable first step,"[4] such a procedure has often led to the impenetrable judicial snarl described in *Jackson* v. *Choate*.[5] Accordingly, it is now the preferred practice in the Fifth Circuit, in all but exceptional cases, to initially constitute the three-judge court and allow it to determine the issue of substantiality and the other issues in the case.[6] The procedure, envisioned in *Jackson*, tends to assure that the decision by the district court will be the final trial court action in the case. Regardless of the proper appellate course, the Court of Appeals or the Supreme Court will have the entire case for determination.[7]

In light of this procedure, the duty, described in *Redding*, to determine the substantiality of the federal question devolves upon the present panel. It is an elementary principle of law that a federal court has jurisdiction of a case,

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[2] 304 U.S. 252 (1938). *See* Bailey v. Patterson, 369 U.S. 7 (1962).

[3] 304 U.S. at 254.

[4] Jackson v. Choate, 404 F.2d 910, 912 (5th Cir. 1968).

[5] 404 F.2d 910 (5th Cir. 1968).

[6] *Id.*

[7] *See* Hargrave v. McKinney, 302 F. Supp. 1381 (M.D. Fla. 1969); Rodriguez v. Brown, 299 F. Supp. 479 (W.D. Tex. 1969).

initially, to determine whether it has jurisdiction to ultimately decide the merits of the case.[8] As Chief Judge Brown observed in *Jackson*, "Frequently in resolving the threshold issue of substantiality—i.e., the need for a 3-Judge Court—the Court has to go to the very merits of the case."[9] Such is the case here. After a careful study of the complaint and following a hearing on the question, we are of the unanimous opinion that the State of Alabama's claim does not present a substantial federal question inasmuch as it is foreclosed by prior decisions of the United States Supreme Court.[10]

The Act in question provides:

> *Enrolled*, an Act, To Prevent Discrimination on Account of Race, Color, Creed or National Origin in Connection With the Education of the Children of the State of Alabama. Be it Enacted by the Legislature of Alabama: *Section 1.* No person shall be refused admission into or be excluded from any public school in the State of Alabama on account of race, creed, color or national origin. *Section 2.* No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors or national origins; and no school district, school zone or attendance unit, by whatever name

[8] C. Wright, Federal Courts § 16 at 50-53 (2d ed. 1970).

[9] 404 F.2d at 913.

[10] Bailey v. Patterson, 369 U.S. 7 (1962); California Water Service Co. v. Redding, 304 U.S. 252 (1938); Potts v. Flax, 313 F.2d 284 (5th Cir. 1963).

known, shall be established, re-organized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established. *Section 3.* The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains. *Section 4.* All laws and parts of laws in conflict herewith are hereby repealed. *Section 5.* This Act shall become effective upon its passage and approval by the Governor, or upon its otherwise becoming a law.

The constitutional question involves only Section 2 of the Act. This section purports to make school administrators neutral on the question of desegregation and limits their tools for the accomplishment of this constitutional obligation to "freedom-of-choice" plans. It is clear, indeed, it is insisted by the State of Alabama, that such a limitation is in direct conflict with numerous desegregation plans approved and ordered by federal courts throughout Alabama.[11]

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[11] Paragraph VI of the complaint provides:

It is further alleged by plaintiffs that the said Act if con-

Brief Appendix B
Opinion and Order of Three-Judge District Court

An unwaivering line of Supreme Court decisions make it clear that more than administrative neutrality is constitutionally required. "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin v. School Board, 377 U.S. 218, 234, 12 L.Ed.2d 256, 267, 84 S.Ct. 1226 (1964); Green v. County School Board of Kent County, 391 U.S. 430, 438-439, 442, 20 L.Ed.2d 716, 723, 724, 726, 88 S.Ct. 1689 (1968)."[12] Neither are "freedom-of-choice" plans the optimum tool for the accomplishment of this obligation. In *Green* v. *County School Bd.*[13] the Court held such a plan insufficient, stating, "if there are reasonably available other ways, such

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stitutional is required to be followed and applied by all courts, state and federal; that where conflict exists between prior orders of any court and the Act the orders should be amended or modified to conform to the provisions of the state law.

The prayer for relief contains the following:

2. By way of supplemental relief, if the said Act is decreed to be constitutional, that this court modify or amend every prior order relating to the public schools issued by it so as to make the orders conform to and not conflict with the provisions of Act No. 1.

5. That defendants Jerris Leonard, as Chief of the Civil Rights Division, be ordered by this court to follow the provisions of said Act No. 1 in all future cases involving the desegregation of the public schools in Alabama and to apply to all courts in Alabama in which he has appeared for modification of prior decrees which now conflict with the provisions of Act No. 1.

[12] Alexander v. Holmes Co. Bd. of Ed., 396 U.S. 19 (1969). *See* United States v. Jefferson County Board of Education, 372 F.2d 836, 845-46 (5th Cir. 1966), *aff'd reh. en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967).

[13] 391 U.S. 430 (1968).

for illustration as zoning,[14] promising speedier and more effective conversion to a unitary, non-racial school system, 'freedom-of-choice' must be held unacceptable."[15]

The settled state of the law convinces us that there is no substantial federal question presented in this case. Where Section 2 of the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. Indeed this has already been the result in cases where this and similar legislation has been asserted as a bar to constitutional obligations.[16]

We are also of the unanimous opinion that a three-judge court is not required for the present action under 28 U.S.C. § 2281.[17] However, we are mindful that the question pre-

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[14] The subject Act expressly prohibits zoning.

[15] *Id.* at 441.

[16] A Three-Judge Court in the Middle District of Alabama in Lee, et al v. Macon Co. Bd. of Ed., Civ. No. 604-E, on three occasions following passage of the Act, refused to modify prior orders to allow the school boards involved to continue to operate under Freedom of Choice: Tuscumbia City Board, order dated March 12, 1970; Colbert County System, order dated March 16, 1970; Monroe County System, order dated March 23, 1970.

In Swain v. Charlotte-Mecklenburg Bd. of Ed., et al., (W.D. N.C., No. 1974, April 29, 1970), a three-judge court held provisions of an analagous North Carolina law unconstitutional insofar as it interfered with the school board's duty to establish a unitary school system.

In Bivins v. Bibb Co. Bd. of Ed. (M.D. Ga. No. 1926, May 22, 1970) the district court enjoined an action in state court which sought an injunction requiring the local board to comply with a similar Georgia statute.

[17] 28 U.S.C. § 2281, provides for a three-judge court where the plaintiff seeks, "An interlocutory or permanent injunction restrain-

sented is important throughout the State of Alabama. Moreover, the ultimate disposition of this case on appeal should be free from unnecessary delay in order to minimize any disruptive effect on the upcoming school year.

Out of an abundance of caution, against the possibility that this case might fall upon the snares described in *Jackson* v. *Choate,* we remand the case for action by a single district judge. The judgment of the district court will become final when joined, through concurrence or dissent, by the other members of the present panel. This assures that, in the event of an appeal, the appropriate appellate court, whether the Court of Appeals or the Supreme Court, will have the entire case for decision.[18]

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ing the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute. . . . " It is a technical statute to be strictly construed. Phillips v. United States, 312 U.S. 246 (1948); C. Wright, Federal Courts § 50 at 189 (2d ed. 1970). For 2281 to apply a state statute must be *challenged* on constitutional grounds in an action in which *injunctive relief* is sought against a state officer who is a party *defendant*. C. Wright, *supra*. The only state officer involved in the instant case is a party plaintiff seeking to uphold the constitutionality of the state statute involved. The injunctive relief requested would operate against officers of the federal government. Inasmuch as the injunctive relief requestd against the federal officers is not related to a constitutional attack on any federal statute, a three-judge court is not required by 28 U.S.C. § 2282.

[18] Rodriguez v. Brown, 299 F. Supp. 479 (W.D. Tex. 1969). *See* Hargrave v. McKinney, 302 F. Supp. 1381 (M.D. Fla. 1969); Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968).

Brief Appendix B
Opinion and Order of Three-Judge District Court

Done at Mobile, Alabama this the 26th day of June 1970.

/s/ WALTER GEWIN
UNITED STATES CIRCUIT JUDGE

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

Order of Dismissal

(Filed June 26, 1970)

PITTMAN, District Judge:

For the reasons stated in the opinion of the three-judge panel remanding the present case to a single judge,[1] the same is hereby dismissed.

GEWIN, Circuit Judge, and THOMAS, District Judge, concur in this order.[2]

Done at Mobile, Alabama this 26 day of June, 1970.

/s/ WALTER GEWIN
UNITED STATES CIRCUIT JUDGE

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

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[1] Opinion of Judges Gewin, Thomas, and Pittman, dated June 26th, 1970.

[2] See note 18 and accompanying text of the three-judge opinion.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* SWANN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 498. Argued October 13, 1970—Decided April 20, 1971

North Carolina's Anti-Busing Law, which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes, *held* invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. Pp. 2–4.

312 F. Supp. 503, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 498.—October Term, 1970

North Carolina State Board of Education et al., Appellants, v. James E. Swann et al. | On Appeal from the United States District Court for the Western District of North Carolina.

[April 20, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

This case is here on direct appeal pursuant to 28 U. S. C. § 1253 from the judgment of a three-judge court in the United States District Court for the Western District of North Carolina. The District Court declared unconstitutional a portion of the North Carolina General Statutes known as the Anti-Busing Law,[1] and granted an injunction against its enforcement.[2] The proceeding before the three-judge court was an ancillary proceeding connected with the school desegregation case heretofore discussed, *Swann* v. *Charlotte-Mecklenburg*, *supra*, p. —.

[1] So far as here relevant, North Carolina General Statute § 115-176.1 reads as follows:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."

[2] 312 F. Supp 503 (1970). The opinion as printed grants only declaratory relief. However the District Court amended its original opinion by withdrawing Part V and entering an order dated June 22, 1970, which enjoined all parties "from enforcing, or seeking the enforcement of," the portion of the statute found unconstitutional.

The instant appeal was taken by the North Carolina State Board of Education and four state officials. We granted the Charlotte-Mecklenburg School Board's motion to join in the appeal, 400 U. S. 804 (1970).

When the litigation in the *Swann* case recommenced in the spring of 1969, the District Court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, bus transportation of students, and any other method which would effectuate a racially unitary system. That litigation was actively prosecuted. The board submitted a series of proposals, all rejected by the District Court as inadequate. In the midst of this litigation over the remedy to implement the District Court's order, the North Carolina Legislature enacted the anti-busing bill, set forth in relevant part in footnote 1.

Following enactment of the anti-busing statute the plaintiffs in the *Swann* case obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the statute. They sought to convene a three-judge court, but no action was taken on the requests at that time because the school board thought that the anti-busing law did not interfere with the school board's proposed plan to transport about 4,000 Negro children to white suburban schools. 306 F. Supp 1291 (WDNC 1969). Other parties were added as defendants by order of the District Court dated February 25. In addition certain persons who had brought a suit in state court to enjoin or impede the order of the federal court, the attorneys for those litigants, and state judges who at various times entered injunctions against the school authorities and blocked compliance with orders of the District Court were also joined; a three-judge court was then convened.

We observed in *Swann, ante,* p. 12, that school authorities have wide discretion in formulating school policy,

and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Similarly the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann,* the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use

of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann*, *ante*, p. 25, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. Cf. *McDaniel* v. *Barresi*, *post*, p. 3.

The remainder of the order of the District Court is affirmed for the reasons stated in its opinion, 312 F. Supp. 503.

Affirmed.